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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 254.

SAMUEL B. GORDON, EDWARD W. FOSTER, AND HENRY WATKINS, PLAINTIFFS IN ERROR,

vs.

JOHN G. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 20, 1879.

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1 In the circuit court of the United States for the northern district of New York, of the June term, 1875.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, & Henry Watkins.

NORTHERN DISTRICT OF NEW YORK, *ss:*

John G. Butler, plaintiff in this action, who resides in the city of Erie, in the State of Pennsylvania, and who is a citizen of the said State of Pennsylvania, by William C. Cooke his attorney, complains of Samuel B. Gordon, Edward W. Foster & Henry Watkins defendants, who reside in the village of Potsdam, in the county of St. Lawrence, in the State of New York & in the northern district thereof, and who are citizens of the said State of New York & of the northern district thereof, by declaration & not by writ, of a plea of trespass on the case.

For the said defendants at said Potsdam, on the 12th day of December, 1872, with the intent to cheat and defraud the plaintiff,
2 did unlawfully and fraudulently combine, conspire, and agree among themselves to cheat and defraud him of his money by obtaining a loan of money from him to the said defendant Samuel B. Gordon upon insufficient security of little or no value; and in accordance with said fraudulent intention, and in pursuance of said unlawful and fraudulent combination, conspiracy, and agreement, two of said defendants, viz, the said Henry Watkins and the said Edward W. Foster, did then and there falsely and fraudulently make and subscribe a certificate in writing appraising certain real estate therein named, a copy of which is as follows: "Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence Co., New York, and acquainted with the sand-stone quarries, about three miles south of Potsdam village; that he is acquainted with the quarry lots there owned by S. B. Gordon, and situate on the westerly shore of Racket River; that said lots are roughly represented on the annexed diagram; have on them the buildings, and in his best judgment contain the quantity of land, and are worth the sums severally below stated, to wit:

3	"No. 1. Falls lot		about	8	acres, worth		$8,000
	" 2. Orchard	"	"	4	"	"	$5,000
"	3. Cox	"	"	16	"	"	$8,000
"	4. Hicks	"	"	15	"	"	$5,000
"	5. Meacham	" house & barn	"	7	"	"	$5,000
"	6. Hale	"	"	10	"	"	$1,000
"	7. Parmenter	" 2 " "	"	17	"	"	$8,000
"	8. Train	" " "	"	26	"	"	$8,000
"Total 8 lots				103			$48,000

"Dated Potsdam, Dec. 12, 1872.

"H. WATKINS,
"E. W. FOSTER."

There was appended to said certificate a diagram such as referred to in said certificate. And the plaintiff further avers that in accordance

with said fraudulent intent, and in pursuance of said unlawful and fraudulent combination, conspiracy, and agreement, one of said defendants, the said Samuel B. Gordon, thereafterward, to wit, on the first day of Jan., 1873, to wit, at said Potsdam, delivered said certificate to the plaintiff, and then and there solicited the plaintiff to loan him, the said Samuel B. Gordon, upon his bond, secured by a portion of the real estate named in said certificate of appraisal, the sum of ten thousand dollars in money, and the plaintiff, relying upon said certificate
4 of appraisal and not knowing it to be false and fraudulent, but believing it to be true, and being ignorant of the aforesaid unlawful and fraudulent combination, conspiracy, & agreement to cheat and defraud him of his money, then and there loaned the said Samuel B. Gordon said sum of ten thousand dollars in money, and then and there delivered the same to him for his, the said Samuel B. Gordon's bond for ten thousand dollars of that date, payable in three years from date, with interest semi-annually, secured by the mortgage of said Samuel B. Gordon and his wife Jane Anne Gordon, duly made, executed, and delivered to the plaintiff of a part of the real estate named in said certificate of appraisal, which part is described in said mortgage, as follows:

All that certain piece or parcel of land situate in the town of Pierrepont in said county, and bounded thus: Beginning in the middle of the highway leading from Potsdam Village to Colton on the westerly side of Racket River, at the intersection of said highway with the middle of the highway called Mill street, in the village of Ellsworth; and running thence easterly along the middle of said street about twenty-five rods to an angle therein; thence easterly directly to the middle of
5 Racket River, about twenty-five rods; thence northerly along the middle of said river as it winds and turns, about one hundred and sixty-eight rods, to the town of Potsdam aforesaid; thence westerly along the southerly bounds of Potsdam, aforesaid, about one hundred rods to the middle of said first-mentioned highway; thence southerly along the middle thereof, about one hundred and forty-one rods to the place of beginning; containing about fifty-one acres of land, being the northeasterly part of Mill lot No. 9, and being the following named quarry lots, and the whole thereof, to wit:

The Falls lot, containing about 8 acres.
The Orchard lot, containing about 5 acres.
The Benj. Cox lot, containing about 16 acres.
The Hicks lot, containing about 15 acres.
The Meacham lot, containing about 7 acres; excepting and reserving the said Orchard lot of about five acres.

And that part of said real estate named in said certificate of appraisal and described in said mortgage, is valued in said certificate of appraisal as follows: The Falls lot, at $8,000; the Orchard lot, at $5,000; the Benj. Cox lot, at $8,000; the Hicks lot at $5,000; the Meacham lot, at $5,000; and in the aggregate at $31,000, includ-
6 said Orchard lot, and excluding said Orchard lot, at $26,000; and the plaintiff being deceived by said unlawful and fraudulent combination, conspiracy, and agreement, and relying upon said false and fraudulent certificate of appraisal as aforesaid, loaned the said Samuel B. Gordon said sum of ten thousand dollars, and received therefor said bond and said mortgage.

And the plaintiff avers that the bond of said Samuel B. Gordon, without security, was then and there of little value, and was then and there known to the plaintiff to be of little value; that the plaintiff then

and there loaned said money as aforesaid, relying upon said mortgage as his security, and was then and there induced to rely upon said mortgage by the false and fraudulent representation in said certificate of appraisal; that the said real estate included in said mortgage, exclusive of said Orchard lot, was of little or no value; that the valuation of the same in said certificate of appraisal at the sum of $26,000 in the aggregate is false and fraudulent, and made in accordance with said fraudulent intent, and in pursuance of said unlawful and fraudulent combination, conspiracy, and agreement of the defendants to cheat and
7 defraud the plaintiff; that the representations in said certificate of appraisal that the real estate named therein, which was conveyed by said mortgage, embraces sandstone quarries; that there were four quarry lots of sandstone included therein, exclusive of the Orchard lot, are false and fraudulent; that in truth and in fact there was not any sandstone quarries nor quarry lots of sandstone in the land conveyed by said mortgage; that the defendants, all of them, well knew when said certificate of appraisal was made, and when said loan was obtained in manner aforesaid, that the appraisal in said certificate of the real estate conveyed by said mortgage was false; that the same was of little or no value; that there were no sandstone quarries on the same, and no quarry lots of any kind; whereby the plaintiff has been deceived and defrauded as aforesaid.

Also for that the defendants, on the 12th day of December, 1872, at said Potsdam, with intent to cheat and defraud the plaintiff, did then and there unlawfully conspire and agree among themselves to cheat and defraud the plaintiff of his money, and in accordance with
8 said intent, and in pursuance of said conspiracy and agreement, the defendants solicited a loan of money from the plaintiff to the said Samuel B. Gordon, and at the same time made and exhibited to the plaintiff a certificate in writing, subscribed by two of said defendants, viz, the said defendant Henry Watkins and the said Edward W. Foster, in which certificate certain real estate of the other defendant, the said Samuel B. Gordon, situated near said Potsdam, and in Pierrepont, in said county of St. Lawrence, was appraised at the value of twenty-six thousand dollars, and was represented to have quarries of sandstone upon it, and to have four sandstone quarry lots upon it, and the said defendants then and there, by means of said certificate, induced the plaintiff to loan the said Samuel B. Gordon the sum of ten thousand dollars upon the security of a mortgage on said real estate in said town of Pierrepont. And the plaintiff avers that said real estate was of little or no value; that there were no sandstone quarries on it, or quarry lots of any kind; that the defendants well knew this when they made and exhibited said certificate to him; that he made said loan relying upon the truth of said appraisal and representations, and in en-
9 tire ignorance of said intent and conspiracy of the defendants to cheat and defraud him; that the said Samuel B. Gordon is wholly irresponsible, worthless, and insolvent.

Whereby the plaintiff has been deceived and defrauded by the defendants of his money aforesaid.

Also for that the defendants on the 12th day of December, 1872, at said Potsdam, with the intent to cheat and defraud the plaintiff, did then and there conspire and agree to cheat and defraud him of his money by obtaining from him a loan of money upon the individual bond of one of said defendants, the said Samuel B. Gordon, secured upon certain real estate of the said Samuel B. Gordon, situate in Pierrepont in said county of St. Lawrence, of little or no value, and in ac-

cordance with said fraudulent intent, and in pursuance of said conspiracy, the said defendants then and there represented to the plaintiff that there were valuable sandstone quarries on said real estate; that there were four sandstone quarry lots on the same, and that said real estate was of the value of twenty-six thousand dollars; and by means of said representations the said defendants then and there obtained from the plaintiff a loan of ten thousand dollars on the individual bond of said Samuel B. Gordon, secured by a mortgage on said real estate. And the said plaintiff avers that there are no sandstone quarries on said real estate, nor quarry lots of any kind; that said real estate was worthless or nearly so; that said representations of said defendants were false and fraudulent, of all of which the defendants were then and there well knowing; whereby the said plaintiff has been cheated and defrauded by the defendants, and has lost his money aforesaid.

To the damage of the said plaintiff of fifteen thousand dollars, and therefore he brings suit.

W. C. COOKE,
Att'y for Pl'ff.

(Endorsed:) U. S. circuit court, north. dist. of N. Y. John G. Butler vs. Samuel B. Gordon, Edward W. Foster, & Henry Watkins. Declaration. W. S. Cooke, att'y for pl'ff. Filed September 3, 1875.

United States circuit court, northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, and Henry Watkins.

On filing declaration in this case and on motion of W. C. Cooke, plaintiff's attorney, ordered that the defendants herein appear and plead thereto within twenty days after service on them of a copy thereof and notice of the entry of this rule or judgment, &c.

In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
HENRY WATKINS IMPLEADED WITH SAMUEL B. Gordon & Edward W. Foster.

NORTHERN DISTRICT OF NEW YORK, *ss:*

And the said defendant, Henry Watkins, by Sawyer & Russell, his attorneys, comes and defends the wrong and injury, when, &c., and says he is not guilty of the said supposed grievances laid to his charge or any or either them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

And for a further plea in this behalf the said Henry Watkins, by leave of the court, here for this purpose had and obtained, according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that after the said supposed

grievances in the said several counts of the said declaration con-
16 tained, with full knowledge of all the facts, the said plaintiff assented to, ratified, and confirmed the said alleged loan and the security therefor; and this the said Henry Watkins is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him, &c.

SAWYER & RUSSELL,
Att'ys for said Deft's, Canton, N. Y.

17 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, & Henry Watkins.

UNITED STATES OF AMERICA,
Northern District of New York, County of St. Lawrence, ss:

Henry Watkins, of Potsdam, in said county and district, being duly sworn, deposes and says that he is one of the defendants in the above-entitled suit; that he has fully and fairly stated the case therein to his counsel, William H. Sawyer, an attorney and counselor of this court, who resides at the village of Canton, in said county and district; that he has a good and substantial defense upon the merits in said suit, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes.

HENRY WATKINS.

Subscribed and sworn to before me September 27, 1875.
E. M. HOLBROOK,
U. S. Comm'r.

18, 19 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
HENRY WATKINS, IMPLEADED WITH SAMUEL B. Gordon, & Edward W. Foster.

UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, William H. Sawyer, of Canton aforesaid, an attorney and counselor of this court, referred to in the foregoing affidavit, hereby certify that after the statement to me by the defendant Henry Watkins of this case in this suit, as set forth in the said affidavit, I advised the said defendant, Henry Watkins, that he had a good and substantial defense in this suit upon the merits, as in said affidavit set forth.

W. H. SAWYER.

CANTON, *September* 29, 1875.

20 (Endorsed:) United States circuit court, northern dist. of N. Y. John G. Butler vs. Henry Watkins, impleaded with Samuel B. Gordon, & Edward W. Foster. Plea, affidavit, & certificate. Sawyer & Russell, att'ys for def't, Canton, N. Y. To file. Filed September 30, 1875.

21 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, IMPLEADED WITH EDward W. Foster & Henry Watkins.

NORTHERN DISTRICT OF NEW YORK, *ss:*

And the said defendant, Samuel B. Gordon, by Sawyer & Russell, his attorneys, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

And for a further plea in this behalf the said Samuel B. Gordon, by leave of the court here for this purpose, had and obtained, according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that after the said supposed grievances in the said several counts of the said declaration con-
22 tained, with full knowledge of all of the facts, the said plaintiff assented to, ratified, and confirmed the said alleged loan and the security therefor, and this the said Samuel B. Gordon is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him, &c.

SAWYER & RUSSELL,
Att'ys for said Defendant, Canton, N. Y.

23 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, & Henry Watkins.

UNITED STATES OF AMERICA,
Northern District of New York, County of St. Lawrence, ss:

Samuel B. Gordon, of Potsdam, in said county and district, being duly sworn, deposes and says that he is one of the defendants in the above-entitled suit; that he has fully and fairly stated the case therein to his counsel, William H. Sawyer, an attorney and counselor of this court, who resides at the village of Canton, in said county and district; that he has a good and substantial defense upon the merits in said suit, as he is advised by his said counsel after such statement made as aforesaid, and verily believes.

SAMUEL B. GORDON.

Subscribed and sworn to before me September 23, 1875.

CHARLES O. TAPPAN,
U. S. Com'r, N. D. of N. Y.

24, 25 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, IMPLEADED WITH EDward W. Foster & Henry Watkins.

UNITED STATES OF AMERICA,
Northern District of N. Y., ss:

I, William H. Sawyer, of Canton aforesaid, an attorney and counselor of this court referred to in the foregoing affidavit, hereby certify that after the statement to me by the defendant Samuel B. Gordon, of this case in this suit, as set forth in the said affidavit, I advised the said defendant Samuel B. Gordon that he had a good and substantial defense in this suit, upon the merits, as in said affidavit set forth.

WILLIAM H. SAWYER.

CANTON, *September* 29, 1875.

26 (Endorsed:) U. S. circuit court, north. dist. of New York. John G. Butler vs. Samuel B. Gordon, impleaded with Henry Watkins and Edward W. Foster. Plea, affidavit, & certificate. Sawyer & Russell, att'ys for def'ts, Canton, N. Y. To file. Filed Sep. 30, 1875.

27 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
EDWARD W. FOSTER IMPLEADED WITH SAMnel B. Gordon & Henry Watkins.

NORTHERN DISTRICT OF NEW YORK, *ss:*

And the said defendant Edward W. Foster, by Sawyer & Russell, his attorneys, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

And for a further plea in this behalf the said Edward W. Foster, by leave of the court here for this purpose had and obtained, according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that after the said supposed griev-
28 ances in the said several counts of the said declaration contained, with full knowledge of all the facts, the said plaintiff assented to, ratified, and confirmed the said alleged loan and security therefor; and this the said Edward W. Foster is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him, &c.

SAWYER & RUSSELL,
Atty's for said Def't, Canton, N. Y.

29, 30 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER and Henry Watkins.

UNITED STATES OF AMERICA,
Northern District of New York,
County of St. Lawrence, ss:

Edward W. Foster, of Potsdam, in said county and district, being duly sworn, deposes and says that he is one of the defendants in the above-entitled suit; that he has fully and fairly stated the case therein to his counsel, William H. Sawyer, an attorney and counselor of this court, who resides at the village of Canton, in said county and district; that he has a good and substantial defense upon the merits in said suit, as he is advised by his said counsel after such statement made as aforesaid, and verily believes.

E. W. FOSTER.

Subscribed and sworn to before me, September 27, 1875.
CHARLES O. TAPPAN,
U. S. Com'r, N. D. of N. Y.

31 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
EDWARD W. FOSTER, IMPLEADED WITH Samuel B. Gordon & Henry Watkins.

UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, William H. Sawyer, of Canton aforesaid, an attorney and counselor of this court, referred to in the foregoing affidavit, hereby certify that after the statement to me by the defendant Edward W. Foster, of this case in this suit, as set forth in the said affidavit, I advised the said defendant Edward W. Foster that he had a good and substantial defense in this suit upon the merits as in said affidavit set forth.

W. H. SAWYER.

CANTON, *September* 29, 1875.

32 (Endorsed:) United States circuit court, north. dist. of New York. John G. Butler vs. Edward W. Foster, impleaded with Samuel B. Gordon and Henry Watkins. Plea, affidavit, & certificate. Sawyer & Russell, att'ys for said def't, Canton, N. Y. To file. Filed Sep. 30, 1875.

33 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, & Henry Watkins.

It is hereby stipulated and agreed that the second plea of the said

defendants, by them separately pleaded in this action, and to which the said plaintiff has demurred, may be and are hereby withdrawn, leaving the plea of the general issue by them pleaded to stand as the only plea in this action by the defendants, with the same force and effect as if that were the only plea originally pleaded by them, without prejudice to any defense provable under the general issue, and that the issue upon such plea date from the time of the service of the similiter by the plaintiff, to wit, Nov. 3, 1875.

Canton, Jan'y 6, 1876.

W. C. COOKE,
Att'y for Pl'ff.
SAWYER & RUSSELL,
Att'ys for Def'ts.

34 (Endorsed:) In the circuit court for the northern dist. of New York. John G. Butler vs. Samuel B. Gordon, Edward W. Foster, and Henry Watkins. Stipulation. W. C. Cooke, att'y for pl'ff; Sawyer & Russell, att'ys for def'ts. Filed Jan'y 22, 1876.

35 At a stated term of the circuit court of the United States of America, for the northern district of New York, in the second circuit, held at the village of Canandaigua, on Wednesday, the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Hoyt H. Wheeler, judge.

A. X. Parker, J. Thomas Spriggs, & Mr. Bingham, for pl'ff; T. W. Russell, Chas. O. Tappan, and Mr. Brinkerhoff, for def'ts.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, and Henry Watkins.

On motion of A. X. Parker, plaintiff's attorney, ordered that a jury be empannelled, and that the trial of this case do now proceed.

Whereupon the following-named jurors were called and sworn:

Homer Chase.	William W. Miner.
Henry Sutherland.	George G. Smith.
Yates Stancell.	George Noble.
Edward E. Baker.	Noah J. Parmele.
John B. Armitage.	Stephen Johnson.
Oscar G. Cummings.	James C. Debow.

Mr. Parker opens case for plaintiff.

36 Plaintiff's witness, John G. Butler.

Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.

Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.

Trail proceeds.

Plaintiff's witness, John G. Butler recalled.

Court adjourned until 10 a. m. to-morrow.

THURSDAY, *June* 28, 1877—10 o'clock a. m. Court met.
Present, Judge Wheeler

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Plaintiff's witness, John G. Butler, recalled.
37 Documentary evidence offered and received.
Plaintiff's witness, George Parker.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Plaintiff's witnesses: George Parker, recalled; Henry M. Train, Peter Post, Hugh Young.
Court adjourned until 10 o'clock a. m. to-morrow.

FRIDAY, *June* 29, 1877—10 o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
38 Trial proceeds.
Plaintiff's witnesses: Andrew J. Train, William Matthews, Alpheus W. Emery, Charles G. Eastman.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Plaintiff's witnesses: Henry W. Emory, Richard Downey, Truman Jones, Rollin C. Green, Edward Hitchings, Charles Hitchcock.
Court adjourned until 10 o'clock a. m. to-morrow.

SATURDAY, *June* 30, 1877—10 o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
39 Plaintiff's witnesses: Charles Hitchcock, recalled; William H. Brewer, Theodore E. Swift.
Pl'ff rests.
Mr. Tappan requests the court to direct a verdict for the defendants, Foster & Watkins.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Mr. Tappan continues argument.
Court refuses to direct verdict for def'ts Foster and Watkins.
Mr. Tappan opens case for defendants.
Defendants' witness, Benjamin F. Sherman.
Court adjourned until Monday, July 2, 1877, at 10 o'clock a. m.

40 MONDAY, *July* 2, 1877—10 o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Defendants' witnesses: Benjamin F. Sherman, recalled; Israel P. Hunt.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Defendants' witnesses: Israel P. Hunt, recalled; George Robinson,

Ilan B. P. Lang, William W. Smith, Lewis La Barge, Joseph B. Austin, Charles Cox.

Court adjourned until 9 o'clock a. m. to-morrow.

41 TUESDAY, *July* 3, 1877—9 o'clock a. m. Court met.
Present, Judge Wheeler.

A juror in case on being absent, court takes a recess until ringing of bell.

11.30 a. m., court convenes.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Defendant's witnesses, Charles Cox, recalled; William Washburn.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, ET AL.

Jury called; 12 answer.
Trial proceeds.
42 Defendant's witnesses: George B. Swan, Luke Usher, Gardner R. Crandall, Henry Watkins.
Court adjourned until 9½ o'clock a. m., Thursday, July 5, 1877.

THURSDAY, *July* 5, 1877—9½ o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Defendant's witnesses: Henry Watkins, recalled; Edward W. Foster.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Defendant's witnesses, Edward W. Foster, recalled; Henry Foster, Mr. Parmenter.
43 Court adjourned until 9½ o'clock a. m. to-morrow.

FRIDAY, *July* 6, 1877—9½ o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Deposition of Samuel B. Gordon, on the part of defendants, read.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Trial proceeds.
Reading of deposition of Gordon continued.
Documentary evidence offered and received.
Def'ts rest.
44 Plaintiff's witnesses:
John G. Butler, recalled. George Parker, recalled.
Andrew J. Train, " Richard Downey, "
Peter Post, " Charles S. Duncklee.
Evidence closed.

SATURDAY, *July* 7, 1877—11 o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Mr. Russell sums up case for defendants.
Recess until 2 o'clock p. m.

2 O'CLOCK p. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Mr. Bingham sums up case for plaintiff.
Court charges jury.
45 Court adjourned until 9½ o'clock a. m., Monday, July 9, 1877.

MONDAY, *July* 9, 1877—9½ o'clock a. m. Court met.
Present, Judge Wheeler.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

Jury called; 12 answer.
Court continues charge to jury.
Jury retire in charge of a sworn bailiff, to consider their verdict.
Ordered that the marshal furnish dinner to the jury in this case.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, ET AL.

Ordered that the marshal furnish supper to the jury in this case.
The jury here came into court, and being called, answer and say they find a verdict for the plaintiff, for $11,811.88. Jury polled.
46 Court adjourned until 9½ a. m., to-morrow.

47 At a stated term of the circuit court of the United States of America, for the northern district of New York, in the second circuit, held at the court-house in the village of Canandaigua, commencing on the 19th day of June, 1877.
Present, Hon. Hoyt H. Wheeler, judge.

JOHN G. BUTLER, PLAINTIFF
ag't
EDWARD W. FOSTER AND HENRY WATKINS, impleaded with Samuel B. Gordon, defendants.

This action having been brought on for trial before a jury, and the jury having rendered a verdict against the defendants, and in favor of the plaintiff for eleven thousand eight hundred eleven $\frac{88}{100}$ dollars ($11,811.88), and the said defendants Foster & Watkins, having given notice to the court, of their intention to file a petition, and take all other necessary proceedings for a new trial, and to make a case and bill of exceptions, and having moved the court for a new trial:
48 Now, on motion of Charles O. Tappan, of counsel for said defendants Foster & Walkins, Thomas Spriggs, esq., of counsel for pl'ff being heard in opposition thereto—
Ordered, that the plaintiff's proceedings upon said verdict be, and the same are hereby, stayed until & including the 25th day of July, 1877.
And it is further ordered that *that* in case the said defendants Foster and Watkins on or before the day last mentioned, make and file in the office of the clerk of this court their own bond, with sufficient sureties, to be approved as to form and sufficiency by a commissioner of this court, in the penal sum of $25,000, conditioned that in case judgment is entered on said verdict, and no writ of error is taken therefrom by said defendants Foster & Watkins, and security given and approved, the obligors upon said bond will pay such judgment, interest, costs and damages as may be adjudged by the court, then that said plaintiff's proceedings upon said verdict be further stayed until the hearing and decision of such motion, in case said case or bill of exceptions is made and served.

49 And it is further ordered that said defendants Foster and Watkins have 60 days in which to make and serve a case or bill of exceptions, either or both, and liberty is hereby given to turn such case when made into a bill of exceptions, and that plaintiff have 60 days in which to propose and serve amendments to such case or bill of exceptions.

That the bill of exceptions and case which may be turned into a bill of exceptions when made, be attached to and form a part of the judgment record herein.

That in case said defendants, Foster & Watkins, shall fail to file said bond so approved in said clerk's office by the time herein provided, plaintiff have leave to enter judgment upon such verdict.

HOYT H. WHEELER,
Judge.

50 (Endorsed:) U. S. circuit court north. dist. of N. Y. John G. Butler vs. Edward W. Foster & an., impleaded, &c. Order staying proceedings, &c. Filed July 10, 1877.

51 United States circuit court northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER and Henry Watkins. } Sep. 17, 1878.

This cause having heretofore come on to be heard on a motion for a new trial made by the defendants Foster & Watkins, before the Hon. Hoyt H. Wheeler, judge, and having been argued at chambers by counsel for the respective parties, after due consideration it is ordered that said motion for a new trial be, and the same is, overruled, and judgment is ordered on the verdict.

52, 53 *Judgment.*

United States circuit court, northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER and Henry Watkins.

The issues in this action having been brought on for trial at a term of said circuit court held at the village of Canandaigua, commencing on the third Tuesday, 19th day of June, A. D. 1877, before the honorable Hoyt H. Wheeler, judge presiding, and a jury, and the said issues having been then and there tried, and the said jury having on the 21st day of said term, being the 9th day of July, 1877, duly rendered a verdict in favor of the plaintiff and against the defendants for the sum of eleven thousand eight hundred and eleven dollars and eighty-eight cents;

And a motion for a new trial having been made by the defendants Foster & Wetkins, and the same having been denied;

And the costs of said plaintiff having been taxed at the sum of one thousand and two hundred and fifty-nine dollars and forty-three cents:

Now, on motion of Mr. A. X. Parker, plaintiffs attorney, it is

54 ordered and adjudged that the said plaintiff John G. Butler do recover of the said defendants, Samuel B. Gordon, Edward W. Foster, and Henry Watkins, the said sum of eleven thousand eight hundred and eleven dollars and eighty-eight cents, ($11,811.88) so as aforesaid found by said jury, with interest thereon from the said day when said verdict was rendered, amounting to one thousand and ninety-five dollars and fifty-four cents, together with the sum of one thousand two hundred and fifty-nine dollars and forty-three cents for costs, so as aforesaid taxed, amounting in the aggregate to the sum of fourteen thousand one hundred and sixty-six dollars and eighty-five cents.

Judgment signed this sixth day of December, A. D. 1878.

CHARLES MASON, *Clerk*.

55, 56 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John G. Butler vs. Samuel B. Gordon, Edward W. Foster, and Henry Watkins. Judgment roll. A. N. Parker, pl'ff's att'y. Damages, $11,811.88; interest, 1,095.54; costs, 1,259.43—14,166.85. Filed December 6, 1878, 12 o'clock m.

57 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER, PLAINTIFF,
vs.
EDWARD W. FOSTER AND HENRY WATKINS, impleaded with Samuel B. Gordon, def'ts.

This action came on for trial at a circuit court of the United States, held in and for the northern district of New York, before the honorable Hoyt H. Wheeler, district judge, and so forth, and a jury duly impanelled, tried, and sworn; and thereupon plaintiff, to maintain issue on his part, called as a witness John G. Butler, who, being duly sworn, testified as follows:

I am the plaintiff in this action. I reside in Erie, Penn.; in 1872 I lived in New York City. I was at that time acquainted with Samuel B. Gordon, and had been since 1861; in 1866 he resided in Potsdam. I know Watkins and Foster; knew Watkins by sight about 1855. Application to loan by Gordon was first made by letters; this is

58 the letter.

Letter dated Oct. 31st, 1872, offer' and received in evidence, and reads as follows:

POTSDAM, *Oct.* 31, 1872.

JOHN G. BUTLER, Esq'r.:

DEAR SIR: When you were here you seemed to take some interest in stone business here, and for this reason I write you about it. When at Rome last week, I went & saw the new Baptist church, the minister, and the building committee, and they all express themselves in the highest terms of praise of our stone, and advise me that large sales will be made if we are prepared to furnish the stone on the favorable impression their church had made. At Syracuse I saw Mr. Russell, the architect of the Rome church, and at my request he gave me a letter, of which I enclose a copy. Mr. Russell told me that there are a large number of public buildings to be erected next season, and he thinks our stone will be wanted for them, or some of them, to a large amount. One of the jobs for which this stone has been furnished this year

59 is Bishop Doane's Episcopal school at Albany. From Rome on our way we had Bishop Doane on the train, and he spoke to me in the highest terms of the stone, using this language: "It is the best building stone in this country by far." Another job being furnished now is for a dwelling-house at Ilion, N. Y., for one of the Remingtons', the fire-arms manufacturers, which is to cost $60,000. He, like the Rome people, is keeping a man here to try and get his stone; this man tells me that Mr. Remington and he like the stone much, and he thinks large quantities will be wanted all along the line of the N. Y. Central R. R. More stone for the new capitol at Albany is now ordered than can be got out this fall, to say nothing of all the other calls. C. P. Geer, of Ogdensburg, is using this stone in building a barn this fall, and intends to use it in building an expensive house next summer. Now, putting these things with what I knew before, and I really cannot doubt that our stone is a valuable one and will command a ready
60 sale of reasonable large quantities, but to make sure of a large call for it, I intend, if I do anything with it, to spend a few hundred dollars in advertising it along the railroads leading from here to Boston, Albany, and Troy, New York, Buffalo, Toronto, and Montreal, and along the St. Lawrence River and the lakes to Chicago. I own all the quarries on the west side of the river, except one, giving over a mile in length and embracing the quarry from which all these stones came, plenty of water-power, about one hundred acres of land, 5 houses, several barns, & a shop, all of which are, in my judgment, *are* worth $100,000. I want to organize a company with a capital of $60,000, take this property at $40,000, leaving $20,000 working capital. I will take $5,000 of the capital, and would be glad to have you or you and Mr. Dunklee take some, as much as you choose of the residue. I am going to take the entire general charge of the business for a year
61 or two at least, so that if it goes wrong we shall know who to charge it to. If you take any of the stock I will, if you wish, guarantee you 10 per cent. an'u'l dividends so long as you hold it, not exceeding five years, if you will give me the right to buy one-half of it back at any time during the five years at par, and I will put up as collateral to my guar'nty, stock or some other good security. 10 per cent. on $60,000 capital, $6,000; to make this we must sell $50,000 worth of stone at an average of 12 per cent. net profit.

About a week ago I was one day at the R. R. depot here, and Parmeter, who runs the quarry this year, was shipping three car-loads of stone, and pointing to one of them he told me, and I believe truly, "That car is for Bishop Doane. I paid $12 for getting and preparing the stone, and $14 for drawing down here from the quarry, $26 in all; and how much do you think I get for it as it stands there?" I said, I of course, did not know. He replied, "$160; and there is another one I made $100 on;" these were, of course, exceptional cases. I be-
62 lieve we can make $6,000 a year; if we cannot, I will make up the deficiency out of my own pocket, so far as you are concerned. If you shall choose to be concerned at all it would be a great gratification to me personally to be associated with you in this business, so that we might own most if not all the stock; but I would not allow myself to ask you to go into it at all except on purely business grounds, and only then to such an extent as would give you no uneasiness. If either of you dare to take hold of it, relying in great part on my judgment that there is money in it, do so; but before doing it make such inquiries and personal investigation as will test my judgment most thoroughly,

for as you see I am more interested in knowing the truth than all others put together.

Yours, truly,

S. B. GORDON.

I replied to that letter. Here is my reply:

63 Letter of Butler to Gordon, dated November 5th, 1872, offered and received in evidence, and reads as follows:

21 BEAVER ST., N. Y., *Nov.* 5, '72.

S. B. GORDON, Esq'r., *Potsdam, N. Y.:*

DEAR SIR: Yours of Oct. 31st on sandstone is rec'd. Mr. Butler thinks there is money in the business, as he said to you when at Potsdam, but does not feel inclined to engage in any new enterprise at present, and Mr. Duncklee feels the same. Mr. S. says if he owned the quarries he thinks he could make them pay, and thinks you can do the same if you take hold and work them.

Yours, truly,

BUTLER & DUNCKLEE.

I heard again from Gordon by letter, dated Nov. 7th, 1872; this letter offered and received in evidence, and read as follows:

POTSDAM, *Nov.* 7, 1872.

MESSRS. BUTLER & DUNKLEE:

DEAR SIRS: Your favor of the 5th inst. is rec'd. I would have been gratified if you had thought it for your interest to take
64 some of the stock of the sandstone co. as an investment, but do not wish you or any one to take it for any other reason. If I can get money I will undertake to work the quarries on a moderate scale for a year or two. Will you loan me some money for two or three years at semi-annual interest, on my note, secured by stock of the sandstone company as collateral; and, if so, how much, and on what amount of the stock? I would like to borrow $20,000 in all, giving my notes and putting double the amount of stock as collateral. I would prefer to get the whole from you, one or both of you, but what I do not get from you I will try to get from other parties, unless I sell stock, which I would endeavor to do. The stock is to be $60,000 in all, to wit, $40,000 for the quarries and $20,000 to raise money to work them. As soon as the business shall be in successful operation I think I can sell the $20,000 for cash and thus relieve the $40,000 of stock that
65 would be pledged as collateral to the $20,000 loan. I want the money from time to time during this fall, winter, and spring. When you see the business in operation you may want some of the stock as an investment. If this should be the case I will be glad to sell it to you, even if the occasion for selling it to raise money had passed, and I should then prefer not to sell except to you. It is nearly time to commence business for next year, and I am anxious to have the means to do it easily and without embarrassment within reach when wanted. If I make a loan I, of course, take all the risk, and therefore venture to say I would be glad if you could accom'odate me.

Yours, very truly,

S. B. GORDON.

I answered this by letter of November 8th, 1872. This letter was offered and received in evidence, and reads as follows:

21 BEAVER ST., N. Y., *Nov.* 8, 1872.

S. B. GORDON, Esq., Potsdam, N. Y.

66 DEAR SIR: Yours of Nov. 6th and 7th have been rec'd; I will loan you some money, but will not promise to let you have $20,000 as I have other uses for money. I would not loan it, however, on sandstone stock as security. Must have security, but could not take that as security; if I owned the quarries I should work them myself alone, as I believe that there is money in them. Let me hear from you on receipt.

Yours truly.

JOHN G. BUTLER.
Per D.

I received this letter of Gordon dated November 8th, 1872. The same was offered and received in evidence and read as follows:

POTSDAM, *Nov.* 8, 1872.

JOHN G. BUTLER, Esq.

DEAR SIR: At the risk of boring you on the subject of stone quarry matters I write to say that if you will, between now and June 1st next, loan me $20,000 on a square bond & mortgage of the quarry
67 property including all on the west side of the river, except the Clarkson or most northerly quarry, which I do not own, and including about 100 acres of land, 7 quarries, 5 houses with barns, shops, &c., and abundance of first-class water power, that will suit me better than any other arrangement for a loan, which I would like for 5 y'rs, but will take it for less, say 3 y'rs, if you prefer. Perfectly clear title and semi-annual int. of course. The property is worth $100,000. You may also have the insurance on all the buildings and a chattle mortgage on every stone got out, and an assignment of every demand for stone sold, in addition to my personal bond. In addition to that I will, if you wish, remove some incumbrance from two quarries on the east side of the river, one of about 3 acres that cost me $2,700, and another of about 20 acres that is worth $5,000, although it cost me only about $1,000. The three-acre quarry is worth more than I gave for it,
68 and the 20 a. also has good water power on it. It is very important for me that I have money to work my quarries, for I am now al'ready for it, with good markets and at remunerative prices, and I ought not to let the market I have created go unsupplied. If you supply the money and do not share any of the chances or profit, I want you to be perfectly secure and the above makes you so. After writing you yesterday it occurred to me that a plain bond and mortgage would suit you and me too, better than the plan of a note and stock col'aterals.

Yours truly.

S. B. GORDON.

I am intending to get out at once and draw to the R. R. depot here at the village by sleighing this winter, from $20,000 to $30,000 worth of stone, i.,e. stone that will cost me $10,000 and will supply $20,000 to $30,000 of contracts.

I sent him this letter of November 11th, 1872; the same was offered and received in evidence, and reads as follows:

69 21 BEAVER ST., N. Y., *Nov.* 11, '72.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

D'R SIR: I wrote you in regard to the O'Brien interest and have received no reply. If he is not going to pay it I want you to foreclose on him. Let me hear from you in regard to it.

Yours resp'y,

JOHN G. BUTLER.
Per D.

I received this letter of Gordon of date of November 9th, 1872. This letter offered and received in evidence, and reads as follows:

"POTSDAM, *Nov.* 9, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of yesterday is rec'v'd. I wrote you on receipt of your letter informing me of Fredericks' reoccupation of his old farm that I would go there to-day, and it did not occur to me until after mailing the letter that to-day would be Saturday and not a good day to leave home. I shall go the forepart of this next week and probably on Monday, the 11th inst. I notice your advertisement of your
70 farms in the Watertown Despatch. This matter of Fredericks need make no difference with your advertising or sale. It is of no account; give yourself no trouble or uneasiness about it. From Jefferson Co. I think I will go to New York, as I have several matters to call me there, and one is to see you about a loan, and talk it over instead of writing. I wrote you yesterday proposing a B and mortgage instead of sandstone stock as security, which you also su'jest in your letter of yesterday. Inclosed are a map of all the quarries and a statement, explanatory of values, and contents, &c. If you are willing to loan me some money on a bond and mortgage of this kind of property tell me what you feel safe in doing, and I will try to meet your requirements.

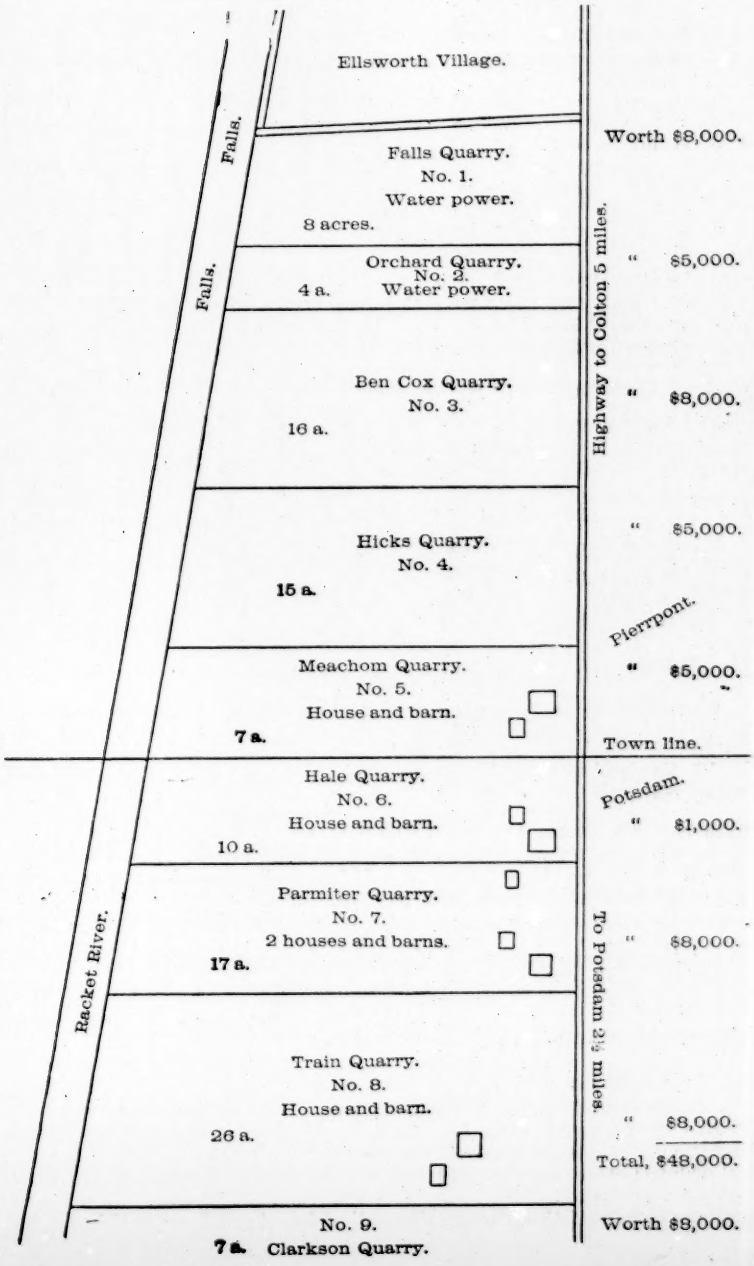
Yours truly,

S. B. GORDON.

Will you be in New York the latter part of next week? Please write me at Watertown.

It enclosed a map & statement. The same was offered and received in evidence, and are as follows:

Map of Potsdam Sandstone Quarries.



73 "*Quarry lots on west side of Racket River.*

No. 1. Falls quarry;	8 acres,	good water-power, worth			$8,000
" 2. Orchard "	4 "	" " " "			$5,000
" 3. Ben Cox "	16 "				$8,000
" 4. Hicks "	15 "				$5,000
" 5. Meacham "	7 "	house & barn			$5,000
" 6. Hale "	10 "	" " "			$1,000
" 7. Old Parmeter	17 "	" " "			$8,000
" 8. Train "	26 "	" " "			$8,000
Total	108 "				$48,000

In giving valuations I give only the ordinary valuation of people who would judge of them from the local trade in stone, and such as I think each could be sold for. No. 7 had got a little out of my reach, and I paid $8,000 for it last spring.

No. 9. Clarkson quarry, 7 acres, worth $8,000

But I expect to give $10,000, and shall do so if I cannot get it without. I expect to have the refusal of it in a few weeks at a price to be named by the owners, who are the original town proprietors.

74 *Quarry lots on east side of Racket River.*

No. 10. Pierrepont quarry,	20 acres,	worth			$5,000
" 11. Knowlton "	14 "	"			$3,000
" 12. Crandall "	6 "	"			$500
" 13. New Parmeter "	3 "	"			$2,700
Total	43 "	"			$11,200

All of these are encumbered, but I can of course remove the encumberances if necessary. I own all the above:

No. 13. Squires' quarry,	10 acres,	worth			$5,000
" 14. Sanford "	10 "	"			$8,000

The Squires quarry is offered to me at $6,000 and nothing shorter; the Sanford quarry is for sale perhaps, but the price is from $15,000 to $30,000. I am anxious to secure all before I proceed at all; for as soon as I commence a successful business the prices will come to nearly or quite full value.

I received a letter Nov. 26th, dated that day, from Gordon. This letter offered and received in evidence, and reads as follows:

POTSDAM, *Nov. 26th*, 1872.

JOHN G. BUTLER, Esq.:

75 DEAR SIR: I returned on Thursday last from my New York and Albany trip, looking up stone quarry matters, and was greatly encouraged as to business by all I learned at every point. To-day C. P. Geer, of Ogdensburg, with his architect, has been here, and ordered stone for a $9,000 house. Yesterday I received an application for stone to build an immense church or cathedral in N. Y. City for Father Hecker of the Roman Catholic Church, and everything looks

as if we could get all the business we want, which is only to get out $50,000 to $60,000 worth of stone the first year. Now I want to borrow $20,000, and I would like to have you loan so much of it, if any, as you feel safe in doing on my bond and a mortgage on all or some of my quarry lots named below, to wit:

1. Falls quarry,	8	acres,	good	water-power,			worth	.....	$8,000
2. Orchard	" 4	"	"	"	"	"		.....	$5,000
3. Ben Cox	" 15	"	"	"	"	"		.....	$8,000
4. Hicks	" 15	"					"	.....	$5,000
5. Meacham	" 17	"	house & barn,				"	.....	$5,000
6. Hale	" 10	"	"	"	"		"	.....	$1,000
7. Train	" 26	"	"	"	"		"	.....	$8,000
Total, 7..	86	"					"	.....	$40,000

76 Dare you let me have any money on any or all of these, and, if any, how much and on what quarries? You will notice I have omitted the Old Parmeter quarry, 17 acres, worth $8,000, which I did because there are two mortgages on it now which I intend to pay off, but which I can let remain unpaid—one is $2,500, and the other, a 2nd mortgage, for $3,500. It is owned by Chas. Cox. I want some money pretty badly, for I think it greatly for my interest to have it, and yet I do not want you to put a dollar into a mortgage on this property except so far as you can do it without the slightest uneasiness as to security. If I can raise the money, whether wholly from you or partly from you and partly from others, I shall adopt you' suggestion and work the quarries pretty moderately myself alone, except in case of parties to whom I am pledged to let in for some small interest, if they shall still want it.

Yours, truly,

S. B. GORDON.

77 I wrote letter in answer to Gordon, dated Nov. 29, 1872, to Gordon. Dunklee wrote it for me, at my request.

This letter offered and received in evidence, and reads as follows:

21 BEAVER ST., N. Y., *Nov.* 29, 1872.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: Yours of Nov. 26th is just rec'd. I dare loan you some money, but desire security, of course. I would not wish at some future day to hear of any loss by you in this enterprise. If I were the owner of the property I would work it and I would make out of it, or I would not work it. In the first place I would not invest over $10,000. I would let the profits remain in the concern, and let the business grow and become strong of itself. Profits are the life-blood of any concern, and the corner-stone of every monied institution. Just keep your eye on the word "profit" and you will have no trouble in money matters. A concern without that word in it will die in time. I wrote you a few days ago about O'Brien. I wish to hear more about Frederick's 78 title very soon. The loan I will make you on 3 years' time; interest payable semi-annually.

Yours, truly,

JOHN G. BUTLER.
Per D.

I received letter from Gordon, dated Nov. 30, 1872.

POTSDAM, *Nov.* 30, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of the 29th inst. is rec'd. I am much gratified at your promise of a loan, and am obliged for your advice, which I think is sound. I dare not, from my cautious nature, undertake this business without about $20,000 to keep me from getting into a money pinch; a situation I was never, with all my business concerns, in, and I could hardly face such a case; at any rate I don't want to try. Whatever sum you think it entirely safe to loan me tell me the property you want a mortgage on, and I will make the necessary papers, and send to you with the abstract of title. What I do not get of you I think I will get of Cox, Watkins, and others, by letting them have some of the stock of a company we will form after giving
79 you the mortgage. I want to start the business with $50,000 to $60,000 of sales the first year, or else I can hardly afford my time to attend to it; but I hope to increase it from year to year to much larger proportions, but only by means of the profits, and I have by means *or* profits a*b*one fair yearly dividends on the stock. We have now orders and propositions for nearly or quite the full am't I want to sell next year, including what will probably be wanted for the new capitol at Albany.

To this extent it is only, as the boys say, a regular open and shut game; we get out a lot of stone at a cost of $100 and sell them for a little more. If you loan me 10,000, as I understand from your letter you will, that will make me strong enough to run the quarries, even if no one else lifts a hand to help me, and I shall try it on, but shall not dare to promise $50,000 worth of stone. It seems to me that even if I should at some future day find a defect in Frederick's title that
80 it is better that you do not know it until after you sell the farm. I have given Brooks a written loan on his farm until spring, M'ch 1, '73. He pays this fall's taxes, takes care of things, and pays a nominal rent only.

Yours, truly,

S. B. GORDON.

I sent you the O'Brien & Rymds int. some days ago.

I received another of same date of Gordon. This letter offered & received in evidence, and reads as follows:

Letter I received from Gordon, dated Nov. 30th, 1872. This letter offered and received in evidence, and reads as follows:

POTSDAM, *Nov.* 30, 1872.—Saturday evening.

JOHN G. BUTLER, Esq.:

DEAR SIR: I wrote hastily this afternoon with an office full and the consequent interruption. In consideration of your kindly and advisory letter of yesterday I want to write you more deliberately.
81 Parmeter, who has run the quarry for 25 y'rs and worked in them 50 y'rs has this year and last worked about 30 men. I have engaged a capable and experience' quarryman at $5 per day and board. Parmeter will remain, and I am to give my own time to the business. Now, is it not both prudent and desirable to work at least 80 men with this large and expensive addition to our supervisory force, provided we have call for the stone and so many can be worked to advantage. 80 men will get out and fit for market about $62,000 worth of stone at a

cost of say $50,000, leaving us a net profit of $12,000 or 10 per cent. interest on double our capital. Ought I to undertake to pay $50,000 cost of these stone with less than $20,000, besides current receipts for stones sold; receipts cannot be relied on sure until July 1st, thus leaving April, May, and June to be paid or out of the $20,000. Now I cannot, and will not, touch this business unless I think I see my way through before I begin, as you of course would advise me. I must therefore reduce the volume of business or have more than $10,000. Again, if I borrow $10,000 of you and run the business on that alone I take all the risk. If I get an additional sum by subscription for stock I thereby relieve myself of so much of the risk which, if I was rich and able to stand a large loss, I would not desire to do. If the stone takes well I hope the 2nd year to double our 1st year's business and to do it from the profits, and the 3rd year to make a similar increase in a similar way: Now what would you do, do what you could alone with $10,000 or get others to add to the capital and share risk? I am under some pledges to parties to let them have stock and an interest, if they persist on it. There are also some advantages in having influential men at prominent points as directors of the co., of which there is a prospect if I still wish it. My plan, you recollect, was to call the quarries $40,000
To raise in cash to work them $20,000

Making a total capital of $60,000

I propose to take half and dispose of half, thus giving me the capital of $30,000
And in cash $10,000

The amount at which I put the quarries $40,000

I wanted this dollars $10,000 cash, to reimburse me to that extent for moneys paid for the quarries which I was illy able to spare. Now I have thought, and still think, I can run the business and not call for any part of this $30,000 that I now propose to raise, but it would be at the risk of shipwrecking the whole, and very unpleasant, even if should *marry* through. My deliberate judgment is to adhere to my original plan so far as I can, to wit, to raise in cash or working capital, $20,000; to reimburse me in part, $10,000—total cash to be raised, $30,000.

My plan of raising this was by a sale of half the concern as organized for operation, but encouraged by the prospect for business, and you' advise, I determined to sell only so much as with what I can borrow will make as the $30,000 to be raised. May I ask the favor of your consideration of the subject and your advice in the premises; you will thus do me a favor for which I will be grateful.

Yours, truly,

S. B. GORDON.

I wrote letter to Gordon, dated Dec. 3rd, 1872. This is the letter.
Letter offered and received in evidence, and reads as follows:

N. Y., *Dec.* 3, '72.

S. B. GORDON, Esq.:

DEAR SIR: Your last rec'ed. If you have the money from me you

must give me r. e. security and worth these times twenty thousand dollars cash at auction, good title, and free from all liens.

I rece'd O'B's and Reynolds int.

Yours, &c.,

J. G. BUTLER.

I was told by Mr. D. that you would be here in a few days

J. G. B.

I received letter from Gordon, dated Dec. 4, 1872. This is the letter. Offered and received in evidence, and reads as follows:

POTSDAM, *Dec.* 4, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of yesterday is received. I expected, of course, to give you for a loan of $10,000 real estate security worth
85 in these, or in any possible times, $20,000, title perfect, and no incumberance. If I don't I don't want the money, as it would not be business-like. What appraisal or evidence of value of the quarry lands do you want? I did intend when in N. Y. to return there about this time, but I remained there so long and got my business so well done up, that I have hoped to avoid going again just now.

Yours, truly,

S. B. GORDON.

I wrote letter, Dec. 5th, 1872, to Gordon. This is the letter. Offered and received in evidence; reads as follows:

N. Y., *Dec.* 5, '72.

S. B. GORDON:

DEAR SIR: Your letter of the 4th just received. In your letter of the 30th, in regard to Frederick's title, I am inclined to think your advice good.

As to security, I expect just what I wrote to you in my letter of the 3rd.

Yours, truly,

J. G. BUTLER.

86 N. Y., *Dec.* 5, 1872.

S. B. GORDON:

DEAR SIR: I have yours of the 30th now before me. Your last check to me is not paid for want of funds in the bank. Your law business must be quite good, and I should continue in it. You have engaged a man in your stone business, and he is a high-priced man, and should relieve you from that business. If eighty men can give you net $12,000, thirty men can give you $4,500.00, and in two years you will have quite an amount in the business; only let the profits remain, then you will own all and can do as you please. My opinion remains the same, but you will do as you think best. Will you send me Leonard papers?

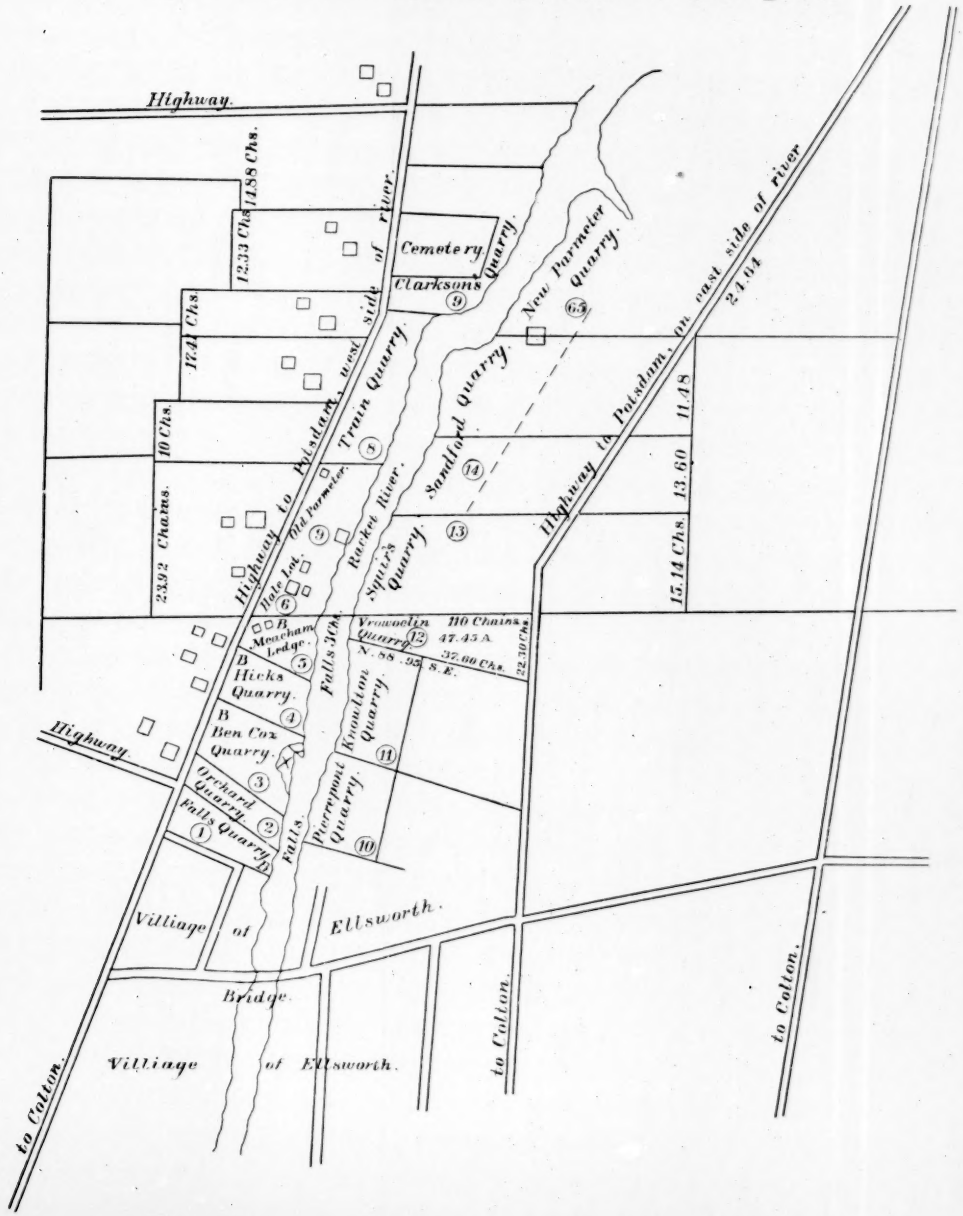
Yours, truly,

J. G. BUTLER.
21 *Beaver St.*

I received letter of Gordon of date Dec. 6th, 1872.

87 Letter offered and received in evidence with statement enclosed. Letter and statement are as follows:

Rough map of Potsdam Sandstone Quarries, and adjoining lots



Ellsworth.

POTSDAM, *Dec. 6th*, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your two favors of yesterday are received. I wrote you yesterday about my protest check, of which the bank telegraphed me; and, now, to-day I have a long letter excusing themselves for not paying it by overdrawing my acc't. But I don't excuse them, for I think they should have paid it, funds or no funds. I am inclined to take your advice, and go it alone on the quarry business. How much money will you loan me for three years on my bond and mortg. on all the quarries except No. 7, on enclosed rough map, on which is already a mortgage to St. Lawrence University for $2,500, and one to Chas. Cox for $8,500, and excepting, also, No. 9, which I do not yet own, provided I give you such appraisal as you shall require, showing that the property is
88 worth, exclusive of buildings, in case double the amount you propose to loan on it, and whose appraisal do you wish me to get, or in what way shall I satisfy you of the value. I suggest that your loan in case it is $10,000, be secured by a mortgage on Nos. 1, 2, 3, and if you wish it, Nos. 4, 5, & 6, or so many of them as you think proper.

Yours, truly,

S. B. GORDON.

I am just in receipt of a draft in place of the protested draft of which I wrote you yesterday, and of expenses of protest; which new draft I forward to the St. Nicholas N. Bank, by this mail. Will you present the check you now have, or shall I send you a new one or a bank draft.

Wrote letter to Gordon of December 10, 1872.

Letter offered and received in evidence, and reads as follows,

21 BEAVER ST., N. Y., *Dec. 10th*, 1872.

S. B. GORDON, Esq., *Postdam, N. Y.*:

DEAR SIR: Yours of the 6th is received. Your check is paid at

91 bank. I must not promise you but the $10,000. I feel it is not for my interest to loan money in this State on b. & m. My opinion now is the same as when I wrote you in a former letter. As to the security, you seem determined to make me say who shall value your quarries, and if this is so, and you compel me to name a man, I shall name W. C. Cook, of Canton; this is, if I am obliged to name a *name a* man, but I did not suppose it necessary. Still, perhaps, this is the best way for us both.

Yours, truly,

JOHN G. BUTLER,
Per D.

Received letter from Gordon of date, Dec. 12th, 1872. Offered and received in evidence and read, as follows:

POTSDAM, *Dec.* 12, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of the 10th inst. is received. I was stupid enough not to get your idea as to the valuation of the appraisal of the quarry lots. Having finally got it through my head, I will have
92 such appraisal made as I think will satisfy you, and submit; then if it does not prove satisfactory we will have Mr. Cook, or any one else you name, appraise them. I am more and more inclined to do what I can with what I borrow of you and no more.

Yours, truly, S. S. GORDON.

Received letter of Gordon, dated December 28th, 1872. Offered and received in evidence; reads as follows:

POTSDAM, *Dec.* 28, 1872.

JOHN G. BUTLER, Esq.:

DEAR SIR: I have to-day received the enclosed abstract of title of Vickery to the George Brown farm, and the co. clerk's letter, also enclosed herein which, letter please return to me. The title now seems to me all right, except the $3,200 mortgage from George Brown and wife to you, which is no objection to be urged by you, but I would suppose Vickery would want it discharged. Vickery should pay the co. clerk's fees, as stated in the enclosed lettter, and when
93 I call on him to do so, perhaps I had better call his attention to this undischarged mortgage against his farm. Do you get any customers for the Fredericks farm? I hope you will before spring. One word more about Vickery's, b. & m., inclosed in the bond; the mortgage was recorded before I left the clerk's office at Watertown, and he offered to let me take it, but I was unwilling to do so, until it had been carefully compared with the record in the usual way, which had not been done. I am quite annoyed at the delay of the county clerks, which you might naturally think were my delays and not theirs. I write to-day to the clerk at Watertown to send me the mortgage by return mail. If it comes I will send it to you at once. If it does not I will go after it pretty soon.

The Allison P. Brooks farm, Brooks is to pay the taxes this month, take care of the farm and buildings during the winter, and give possession on the 1st of March. Can I aid you any in this matter?

Inclosed is a proposed mortgage from me and wife to you for
94 $10,000, at 3 years, on my five upper quarries, and the appraisal

of Edward W. Foster and Henry Watkins, of all the quarry lots. I intended to have sent this mortgage some time before, but have been delayed by not getting my deed of the second quarry, the orchard lot of four acres. I have a contract only of it, and have been expecting a deed of it every day. Is this security satisfactory? Messrs. Foster and Watkins, as you see, appraise it thus:

Falls	lott	$8,000
Orchard	"	$5,000
B. Cox	"	$8,000
Hicks	"	$5,000
Meacham	"	$5,000
Total		$31,000

Each of these gentlemen is of the most respectable and wealthiest citizens of our village or county. You met Mr. Foster at my house; he is a cousin of Henry E. Pierepont, of Brooklyn, and his agent for the sale of his lands in the town of Pierrepont, in which town my quarry lots are. Mr. Foster is supervisor of this town, and has been for a
95 dozen years past; a member of the State board of charities of the constitutional commission, appointed by Gov. Hoffman, which met at Albany a few weeks ago and adjourned over to Jan'y 8th next; but, more than all that, he is a good, square, common-sense man, of sound judgment. And so is Watkins, who was many years an assessor of this town. Will this mortgage, when executed and recorded, and accompanied by my bond and an abstract of clear title be entirely satisfactory to you? If it will, please return the papers to me and I will have them completed. If not satisfactory, please advise me wherein they, the security, or appraisal shall be changed.

Yours, very truly,

S. B. GORDON.

Papers enclosed:
1st. Abstract of title of the Geo. Brown farm.
2nd. Jeff. Co. clerk's letters.
3rd. Proposed mortgage, Gordon to Butler.
4th. Appraisal of quarries.
5th. N. Vickery's bond for $3,200 and int.

MONDAY, *Dec.* 30, '72.

I wrote the above Saturday night, and am now just in receipt of your letter of the 28th inst., with Vickery's letter of the 26th
96 inst. I hardly know what to say to you about Vickery; perhaps you had better leave it just as it stands for the present, i. e., the draft returned to him, and the int. unpaid, and write him you are not prepared to say anything different from what you wrote him when you returned the draft, but when you decide to take any action you will advise him before doing anything in the matter. Inclosed is Vickery's letter.

S. B. G.

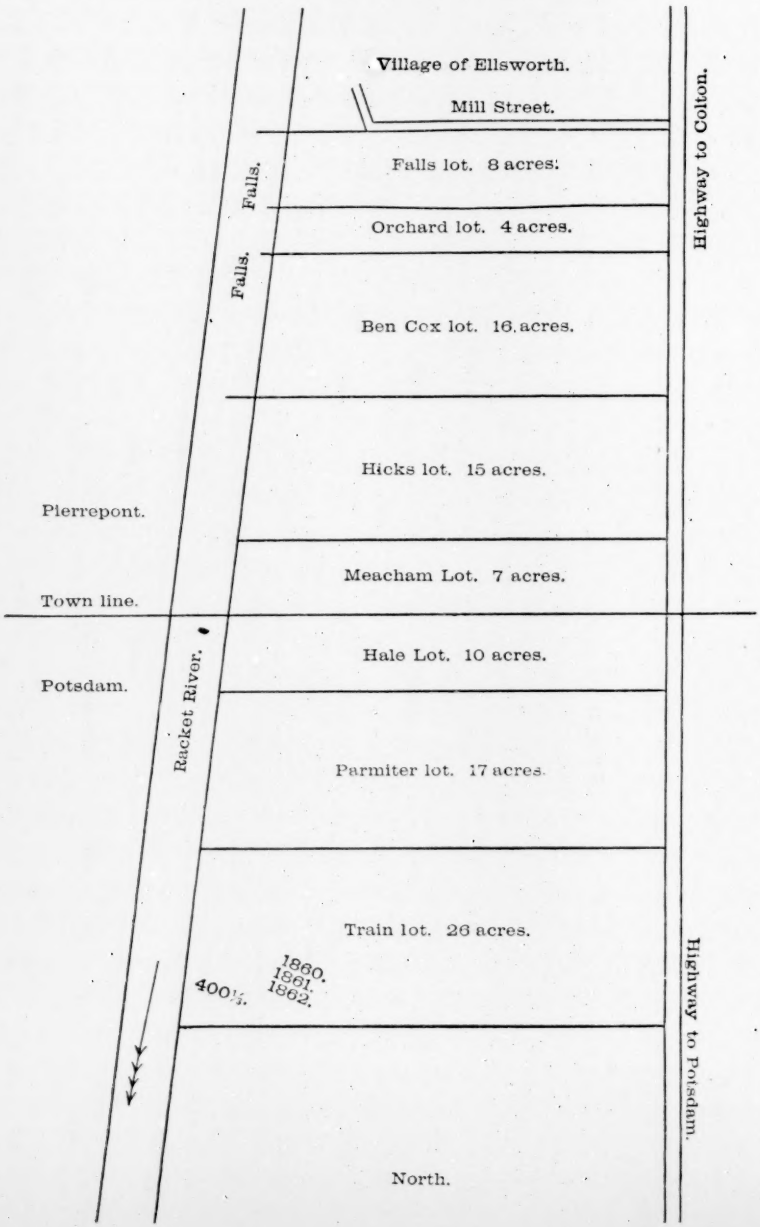
As I wrote you above Brooks pays the taxes on his farm.

This letter contained a certificate of appraisal.

The defendants, Foster and Watkins, admit that they signed the certificate.

This certificate, with diagram attached, offered and received in evidence.

Rough diagram of S. B. Gordon's quarry lots.



99 Each of the undersigned hereby certifies that he is, and has been for more than twenty years last past, a resident of Potsdam, St. Lawrence County, New York, and acquainted with the sand stone quarries, about three miles south of Potsdam Village; that he is acquainted with the quarry lots there owned by S. B. Gordon, and situate on the westerly shore of Racket River; that said lots are roughly represented on the annexed diagram, have on them the buildings, and, in his best judgment, contain the quantity of land; are worth the sums severally below stated, to wit:

No. 1, Falls	lot,	about	8	acres, worth	$8,000
" 2, Orchard	"	"	4	" "	$5,000
" 3, Cox	"	"	16	" "	$8,000
" 4, Hicks	"	"	15	" "	$5,000
" 5, Meacham	"	house & barn,	7	" "	$5,000
" 6, Hale	"	" " "	10	" "	$1,000
" 7, Parmeter	"	" " "	17	" "	$8,000
" 8, Train	"	" " "	26	" "	$8,000
Total, 8 lots			103		$48,000

Dated Potsdam, Dec. 12, 1872.

H. WATKINS.
E. W. FOSTER.

100 I wrote letter to Gordon dated Jan. 4th, 1873. This is the letter:

Offered and received in evidence.

N. Y., *Jan.* 4, '72.

S. B. GORDON Esq.,

DEAR SIR: Yours of the 1st rec'd, with Cornell search and Vickery mortgage. I have returned m. to Jeff. County clerk. Where is the bond? I will write you on Monday next. It is lucky for you that your buildings did not burn.

Yours, truly,

J. G. BUTLER,
21 *Beaver St.*

I wrote another letter to Gordon, dated Jan. 6th, 1873. Offered and received in evidence. Reads as follows:

21 BEAVER ST., N. Y., *Jan. 6th*, '73.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: I promised to write you in reply to yours concerning the quarries this day, but matters came up that could not be put over, and have spent my time upon them, to the neglect of writing you. I
101 will, however, write to-morrow morning without fail; there are one or two alterations I shall want you to make, which I will explain in my next. Enclosed find letter of Vickery, which please read and return, and write me what you think of it. Have not received the Leonard search yet; when shall I have it? I thought till now that the St Lawrence Co. clerks were punctual.

Y'rs, resp'y,

J. G. BUTLER,
Per D.

And still another, Jan. 7th, 1873, offered and received in evidence:

21 BEAVER ST., N. Y., *Jan. 7th*, 1873.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: Your' of Dec. 28th, regarding the quarries, is before me. Are you satisfied that all the paper' are now correct which you have returned me in the Vickery matter? I return you the county clerk's letter. Have received the appraisal of the quarries as make by Foster & Watkins. Find bond of Vickery, dated June 29, '73, enclosed, with pencil-marks on margin, herewith returned. I want it perfect, or I won't have it. I either want a perfect one, or I want my money
102 on the mortgage. I don't want such a paper as this is. The county clerk's expenses which are charged in these matters you must make Mr. Vickery pay. I can't pay them, as it don't belong to me to pay them. I am surprised you accepted such a bond as that. It looks too much like Vickery's way of doing business. I won't have it, anyway. Gilbert Hardy, of Plesis, who acts as my agent for the small farm, wishes to buy that farm; the other Frederick farm, I understand there is a man who wants to buy it (the large farm), but I don't know who he is. The bond enclosed is the one I wrote you about that I couldn't find it. Have found it, and here it is. You had better write Allanson P. Brooks to pay the taxes on that farm—Brooks, of Wörth, and ask him if he has paid them. I don't see as you can give me a mortgage of the Orchard quarry, as you have nothing but a contract for it. The quarries that have buildings on I do not want mortgage on, as I don't want any insurance papers; but I want other quarries in place of such. I return you your mortgage and
103 as soon as your papers are completed and all right you can have the money. It has been ready for you several weeks, and I have been expecting you would call for it. Do you intend to visit Alexandria? If so, when? If you do, of course you will find out all you can and who wants the large farm. I advise you when you go there to call on Mr. Upam, cashier Union Bank at Watertown, as he can probably tell you who the party is, and is a first-rate man for all sorts of information.

Yours, truly, Per D.

P. S. Enclosed find deed of Addison W. Wheelock, sheriff, to me, on which the clerk's certificate of records is incomplete, please have the same made correct when you are at Watertown and return to me at once.

Y'rs, truly,

J. G. BUTLER,
Per D.

Received another letter from Gordon dated Jan. 8th, 1873.
This is the letter offered and received in evidence; reads as follows:

POTSDAM, *Jan'y 8th*, 1873.

JOHN G. BUTLER, Esq.

104 DEAR SIR: Yours of yesterday is rec'v'd, and encloses as stated: 1st. The Vickery bond is all right. I noted in pencil the several matters which *very* evidences of an untidy way of doing business, but none of them is essential or in the slightest degree impairs the sufficiency of the bond. Nevertheless I will take it to Vickery

when I go there to Jeff. Co. and have each one corrected, if you say so. I would not have sent it to you at all if I had not deemed it valid beyond question. 2nd. Vickery will of course pay all expences; I told the county clerk to charge them to him. 3rd. I would dislike to sell the small Frederick farm until I knew what I was going to do with the large one. Hold on about giving an answer until I go there. 4th. I have already directed Brooks to pay the taxes on the farm he is on, and will write asking him if he has done so. 5th. I will go to Jeff. Co. whenever your business there is in good shape for me to attend to a good deal of it. I can go as well at one time as at another. I am never at leisure but always at liberty to attend to business. 6th. I shall
105 have a deed of the Orchard lot to-morrow and will give you a mortgage on that and the other four quarries, all in a row. The houses are of no account in the valuation of any of them; they are worth only a few hundred dollars apiece, and I mentioned them only as descriptive of the lots. The property mortgaged to you, i. e., the five lots, are worth $75,000, and good judges would just as soon appr'ise them at $50,000 as at what they did, and perhaps at $75,000. I did not ask Foster and Watkins. I will send you the papers as soon as I can make them, probable this week.

Your', truly,

S. B. GORDON.

Have got my house nearly repaired.

Received a letter from Gordon dated Jan. 21, 1873. Letter offered and received in evidence, and is as follows.

POTSDAM, *Jan.* 21, 1873.

JOHN G. BUTLER, Esq.

DEAR SIR: Your two letters of the 20th, inst. are rec'd. The deed of the Frederick farm to you has not been *been* returned to me from
106 the co. clerks office, where I left it for record; at least that is my best recollection of it, and I do not find it among my papers in your matters. I write to the clerk for it. Do you wish me to see Hardy when I go to Jeff. Co? If you can arrange a sale by letter, do so. I offered to see him, only to help you, and not because I want to go. If you can sell at $40 per a. it will be a good sale according to my appr'isal. I will get new bond from Vickery or old made right. To-day's mail brought me a letter from Vickery, saying he would pay co. clerk's fees in his matter. He writes me about his costs, &c. in the foreclosure. It does not belong to you to pay Starbuck and I would make Vickery settle it, and I think I would not at present pay him even his own costs, until you see how you are to get out of this Frederick matter, or at least for a while yet. I will talk this matter over with him, and will also see Mr. Uphan whom I formally knew; I also go to see Brooks. Inclosed find my bond and mortgage on

Falls lot, appraised at			$8,000
B. Cox lot	"	"	$8,000
Hicks	"	at	$5,000
107 Meacham	"	"	$5,000
Total value			$26,000

There is only one lot that has buildings on it, i. e., the Meacham lot, and their value is a very inconsiderable amount, only $800 to $900, and they do not effect the appraisal of the lot a dollar. The lot is worth

$20,000 in my judgment, and in the judgment of good, sensible men is worth $10,000, and so of the other lots, each is worth double the appraisal. The mortgage does not, as you see, include the Orchard lot of 4 $\frac{58}{100}$ acres, appraised at $5,000. I preferred to have it in, and sent to the old gentleman who gave me a contract when I bought it, to send me a deed, which after a long delay he sent, and writes that he will be here before long to acknowledge it. Rather than wait any longer for that deed, I sent the mortgage for record without it, but as it still covers property appraised at $26,000, I thought you, perhaps, would regard it as not only sufficient but entirely satisfactory, for I want it to not merely pass muster but to be entirely satisfactory. If it is so
108 now, all right; if not, let me know and I will include the Orchard lot. Inclosed is the clerk's letter. As soon as I can get it from the co. clerk, I will send to you abstract of clear titles back to the town proprietors. Mr. Hunt, my boss quarryman, is here at work, and we have put a large amount of stone on the R. R. depot grounds and shall continue to do so. I would like to use some money, and if you will send me a check for $5,000, of this $10,000, you will oblige me. The stone business, as far as I have gone, looks just as I thought it would. It looks right for success. Mr. Hunt is a capital man and understands his business.

Yours truly,

S. B. GORDON.

Wrote letter to Gordon dated Jan. 23rd, 1873. Offered and received in evidence, and reads as follows:

21 BEAVER ST., N. Y., *Jan.* 23, 1873.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: Yours of Jan. 21st, '78, is rec'd. I rec'd Fredricks deed this week. I wish you to see Hardoy and sell, if you think best.
109 I wish to have my r. e. in Jeff. Co. put into shape so that I will get some income. I shall do with V. as you think best. You talk plain with V. and he better take this Fredrick property, if you can secure, and I think he can. You better advise that. Find check enclosed for ten thousand dollars ($10,000.00.) The Orchard lot Iwas to have security on, and you put it in, as we talked, and that will be best. I hope you will make money out of the enterprise; money will rule high in my opinion, this season, and business will be dull. You must travel with great caution; I hope you will leave for Jeff. Co. very soon. I will look over b. & m. when I can spare time; I presume all are correct; if not, will write; have endorsed interest on b. & m. as paid up to this date. So it will be perfectly right and legal, as you ought to pay no more; and if this does not make it correct and legal, you write me at once. Be sure and send me only what inter-
110 est belongs to me on the 1st day of July. In regard to Starbuck, when Vickery got beat the first time, in 2d Fredrick foreclosure he said he would pay all the costs himself and begin again, and he done so. He has never called on me for any costs in foreclosure suit, for he has got them out of the property, but the understanding has always been between him and me that I should be at no costs in foreclosures of mortgages he took to foreclose for me. If he was incompetent to foreclose a mortgage I should not pay other lawyers to do it. I want you to argue this point with him and beat him down on it; he is a d—d skunk any way, and you have no love or fear for him yourself. I think you had better offer this property to Vickery and tell him he can have

and make all there is to be made on it, if he wants it. But tell him if he had done his duty as a man by me, there would have been not only a large margin on the property, but I never would have had to
111 take it, and the reason there is this feeling between him and me is because he did not do his duty by me. Inclosed find bond & mortgage ag'st Horace Benton to foreclose, of Ellisburgh, due because of non-pay't of interest. I understand Benton has taken benefit of the U. S. bankrupt act. Now, I sent these to you upon these terms, that I am to be at no expense in collecting the same, but you are to get your costs and pay out of the property. Please put this foreclosure through as soon as possible, without any delays. You have one other mortgage in your hands undergoing foreclosure. When do you sell that property? You must bid on these foreclosures for me to amount to my claim in full and costs. Write me on receipt.

Y'rs resp'f'y,

J. G. BUTLER.
Per D.

Interest on Benton mortgage is paid up to July 1st, 1872. He owes interest from that date. Notice in the mortgage that int. was to be paid semi-annually, the 1st days of July and Jan.; from M'ch 22, '64, the date of mortgage, to the 1st of following July was not six mo's,
112 but he paid the int. from M'ch 22 to July 1, '64, and then made his pay *to* semi-annually in July and Jan'y. Your attention is particularly called to the above point; it is a very loose way to draw a mortgage, and was one of the defenses in Frederick case.

Benton, however, paid up from March to July and then his pay'ts semi-annually, so I don't think it would cause any trouble in this case. You will ascertain the cash-value and time-value of property you foreclose on and inform me. You will say as much to Vickery as you think best for my interest; but soft talk does not impress him at all; he needs heavy blows to affect him.

This letter contained a check made by Butler & Dunklee to order of Gordon, dated Jan. 23d, 1873, for ten thousand dollars. Gordon's signature of endorsment is admitted by defendants.

Check offered and received in evidence, and is as follows:

113 [U. S. rev. stamp .02 Cancelled Jan'y 28, 1873.]

No. 764.

NEW YORK, *Jan. 23rd*, 1873.

The National Bank of the Republic pay to the order of John G. Butler ten thousand dollars.

$10,000] BUTLER & DUNKLEE.

(Endorsed:) Pay to the order of S. B. Gordon, esq.

J. G. BUTLER.

Pay to St. Nicholas National Bank or order.

S. B. GORDON.

(Stamped:) The Saint Nicholas National Bank of New York. Paid.

Money was paid on that check.

Bond and mortgage, Gordon to Butler. Offered and received in evidence; read, as follows:

Bond.

Know all men by these presents that I, Samuel B. Gordon, of Potsdam, St. Lawrence County, New York, am held and firmly bound unto John G. Butler in the sum of twenty thousand dollars, to be paid to the said John G. Butler, or to his certain attorney, executors, administrators or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and
114 severally, firmly by these presents. Sealed this first day of January, in the year of our Lord one thousand eight hundred and seventy-three.

The condition of the obligation is such that if the above-bounden Samuel B. Gordon, his heirs, executors, administrators, shall and do well and truly pay, or cause to be paid, unto the above-named John G. Butler, his certain attorney, executors, administrators or assigns, the sum of ten thousand dollars, three years from the date hereof, and interest thereon semi-annually, on the first day of each July and January until said principal be paid, both principal and interest payable at the National Bank of the Republic, in the city of New York; and it is hereby further agreed that in case said interest moneys, or any part thereof, shall remain due and unpaid for the space of twenty days after the same shall by the terms hereof become due and payable, that then the whole principal sum hereby secured to be paid, together with the interest thereon, shall option of the said obligee, his execu
115 tors, administrators, or assigns become due and payable forthwith; And in case said moneys shall be paid as above provided without fraud or delay, then the preceding obligation shall be void; otherwise to remain in full force and virtue.

S. B. GORDON. [L. B.]

Sealed and delivered in the presence of—
O. J. SENTER.

(Endorsed:) Samuel B. Gordon to John B. Butler. Bond. Amount, $10,000. Date, January 1, 1873. Due Jan. 1, 1876. Interest payable Jan. 1, July 1.

Mortgage.—Interest clause.

This indenture, made this first day of January, one thousand eight hundred and seventy-three, between Samuel B. Gordon, of Potsdam, St. Lawrence County, New York, and Jane Ann, his wife, of the first part, and John G. Butler, of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of ten thousand dollars to them duly paid, have granted, bargained,
116 sold, and conveyed, and by these presents do grant, bargain, sell, and convey to the said party of the second part and to his heirs and assigns forever, all that certain piece and parcel of land situate in the town of Pierrepont, in said county, and bounded thus: Beginning in the middle of the highway leading from Potsdam village to Colton, on the western side of Racket River, at the intersection of said highway with the middle of the highway called Mill street, in the village of Ellsworth, and running thence easterly along the middle of said street about twenty-five rods to an angle therein; thence easterly directly to the middle of Racket River, about twenty-five rods; thence northerly along the middle of said river, as it winds and turns about, one hundred and sixty-eight rods to the town of Potsdam aforesaid;

thence westerly along the southerly bounds of Potsdam aforesaid about one hundred rods to the middle of said first-mentioned highway;
117 thence southerly along the middle thereof about one hundred and forty rods to the place of beginning, containing about fifty-one acres of land, being the northeasterly part of Mill lot No. 9, and being the following named quarry-lots and the whole thereof, to wit: The Fall lot, containing about 8 acres; the Orchard lot, containing about 5 acres; the Benj. Cox lot, containing about 16 acres; the Hicks lot, containing about 15 acres; the Meacham lot, containing about 7 acres, excepting and reserving, however, the said Orchard lot, or about five acres, with the appurtenances, and all the estate, title, and interest of the said parties of the first part therein; to have and to hold the same unto the said party of the second part, his heirs and assigns forever: Provided always, and these presents are on this express condition, that if the said Samuel B. Gordon, his heirs, executors, or administrators shall well and truly pay, or cause to be paid, to the party of the second part, his certain attorney, heirs, executors, administrators, or assigns, the sum of ten thousand dollars three years from the date hereof,
118 and interest thereon semi-annually on the first day of each July and January, until said principal shall be paid, both principal and interest payable at the National Bank of the Republic, in the city of New York, according to the condition of a certain bond or writing obligatory bearing even date herewith, executed by the said Samuel B. Gordon to the said party of the second part; which said sums the said Samuel B. Gordon hereby covenants to pay, then these presents shall cease and be void.

And it is hereby further provided that in case any installment of principal, or any part thereof, or any interest money, or any part there' hereby secured to be paid, shall remain due and unpaid for the space of 20 days after the same shall by the terms hereof become due and payable, that then and in that case the whole principal sum hereby secured to be paid, together with the interest thereon, shall (at the option of the said obligee, his executors, administrators, or assigns) become due and payable forthwith,
119 anything herein contained to the contrary notwithstanding, and in *in* case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest as above provided, then the said party of the second part, his executors, administrators, or assigns, are hereby authorized, persuant to statute, to sell the premises above granted, or so much thereof as will be necessary to satisfy the amount then due, with the costs and expenses allowed by law, rendering the overplus, if any there m'y be, to the said Samuel B. Gordon, his heirs, executors, administrators, or assigns. In witness thereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

S. B. GORDON. [L. S.]
JANE A. GORDON, [L. S.]

Sealed and delivered in the presence of—
S. A. REDWAY.

120 STATE OF NEW YORK,
St. Lawrence County, ss:

On this seventeenth day of January, in the year one thousand eight hundred and seventy-three, before me appeared Samuel B. Gordon and Jane Anne, his wife, to me personally known to be the persons de-

scribed and who executed the foregoing instrument, who severally acknowledged that they executed the same, and the said Jane Anne, on a private examination by me, apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

S. AUGUSTINE REDOY,
Notary Public.

(Endorsed:) Mortgage. Samuel B. Gordon and wife to John G. Butler, mortgage for $10,000, dated the 1st day of January, 1873, recorded in the clerk's office of the county of St. Lawrence the 18th day of January, 1873, at 5 hours and minutes p. m., in book No. 60 A of mortgage', on page 7, &c.

T. H. FERRIS, *Clerk.*

121 New York, Jan. 23, '73, received interest on the within to date. July 1, '73, rec'v'd interest on the within to date.

At time of receipt of certificate of appraisal I had not seen the land in question. The whole amount of land was some forty acres. I had no knowledge of the value of that land, and relied upon the statement as to its value; the statement induced me to make the loan. I knew these gentlemen to be men of business in Potsdam. I received this letter from Gordon, dated Jan. 25th, 1873.

Offered and received in evidence and reads as follows:

POTSDAM, *Jan'y* 25, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favors of the 23' inst. are received with the inclosures as stated, and the several matters therein mentioned shall receive immediate attention.

Yours, in haste,

S. B. GORDON.

Will write you again in a day or two.

Received another letter from Gordon dated Jan. 27th, 1873.

122 Offered and received in evidence.

POTSDAM, *Jan'y* 27, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: Absence from home last week on some criminal prosecutions at Massena prevented a fuller and earlier reply to several of your letters to which I now recur. 1st. I am ob'iged to you for sending me the money without waiting for the abstract. It is all right and legal for me to pay the int. from January 1st inst. It is all right, but perhaps not legal, that I should pay it from the time you set apart or kept reserved the money for me, because I did not know it was waiting for me until about the 1st inst. I have not wanted the money until now, and now only a little of it. I will make the security and abstract as we talked, i. e., to include the orchard lot and clear. I am obliged also for your suggestion to move with great caution in this stone matter, and hope I shall have sufficient sense to do so, for I feel its importance. 2. I think your idea of throwing this Frederick property on Vickery's

123 hands, if you can be secure, a good one, and will do all I can to bring it about. It will be a great bother to you if you have it on your hands long. I will see Upham before I see Vickery, and Hardy afterwards, unless Vickery takes the property and secures to our satisfaction. 3d. I have begun foreclosure ag'st Horace Benton. 4th. Foreclosure ag't Jeremiah Low is in judg't and all ready to sell, but J. B. Clark writes me that he will pay up in a few days. 5th. A. P. Brooks matter shall receive special attention, including his cutting timber. 6th. There are 3 judg'ts in favor of Vickery ag't Fredericks, which, with all other liens not discharged, I shall look after when I go to Jeff. Co. I have to be here on the 31st, and shall go to Watertown immediately after.

Yours, truly,

S. B. GORDON.

Received another letter from Gordon dated Feb. 5th, 1873. Letter offered & received in evidence.

POTSDAM, *Feb. 5th*, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: I am sick, and have been since Saturday night last, caused wholly by overwork. I am greatly annoyed at my delay
124 in getting at your business. Dea. Brown's death deprived me of my right-hand man, and the addition to my load of cares and business, caused by the stone quarry business, have overtaxed my strength. I am, however, feeling pretty well to-day, and intend to go to Jeff. Co. to-morrow or next day. I say to-morrow; others say I must not go until next day.

Yours, truly,

S. B. GORDON.

I am at the house resting—simply resting. I am not sick, and have no disease that I know of.

Received this letter from Gordon dated Feb'y 21, 1873. Offered and received in evidence, and is as follows:

POTSDAM, *Feb.* 21, 1873.

JOHN G. BUTLER, Esq.:

MY DEAR SIR: Mr. Vickery has been away from home most of this week, and has not been to see the farm. I have just learned from him by telegraph of his return to Adams and of his inability to give us any answer about the farms until next week. I am a little per-
125 plexed to know what course will serve our interests best. I now think I will go to Adams on Monday next, the 24th inst., and will advise you from there of the situation and doings. I arrived home day before yesterday. The claret came yesterday, and I began work on it at dinner. Do not worry yourself about this Jeff. Co. business; there is no occasion for it. I am, of course, a little annoyed at Vickery's utter disregard of his promise to me; but my principal annoyance arises from the fear of annoying you by these repeated delays; possess your soul in patience and it will all in good time come out right. Some time when you have time and are passing 293 Broadway go up stairs and see Rembrant Lockwood, the architect of Father Hecker's new church and his plans of it. He decided to use our stone

the day I left you; he told us we might rely on it. They will probably want, in the 3 years they will be in putting up the walls, about $100,000 worth of our stone, to say nothing of the convent to be built in the rear also of our stone in part. It will take ten years, and probably a
126 million of dollars, to finish the church alone, 192 ft. front 306 ft. deep, church and convent covering the entire block, bounded by 59th and 60th sts. and 9th and 10th av's. I have done nothing about organizing a quarry co., but have agreed to organize one with $150,000 capital. Allom Watkins to take 6,000, at 5 per cent; Foster to take 5,000, at 5 per cent.; Parmiter to take 15,000 to $20,000, at 5 per cent. Probable Parmiter will not take exceeding $10,000. I do this for two reasons—one is, if this thing "busts," which it is not going to do, I do not want to be personally liable for a dollars beyond what I put in at the beginning; the other reason is, that I cannot get along for a year or two without Parmiter, and I must either form a co. or take him in as a partner, which latter I will not do under any circumstances, he being a very desirable man in some respects, but an unsafe one in that relation. Not less than three persons can
127 form a company. I offered Cox $6,000, which he would take if I would let him take $20,000 more, which I would not do. Foster and Watkins each wanted to take $10,000. I wanted them to take $5,000 each, and we compromised on $6,000 each.

I found my family all well and delighted to see me home again. You go and do likewise.

Yours, truly,

S. B. GORDON.

Please ask Mr. Dunklee also to call at Mr. Lockwood's some time. Ask Mr. Lockwood to show you a piece of our stone that he burned for ten hours without injury to it.

Received another letter from Gordon dated April 9, 1873. Offered and received in evidence, and is as follows:

POTSDAM, *April* 9, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: The reason I asked you to defer the payments of the interest due from Joseph H. Butler on his mortgage, and that due from A. C. Leonard on his mortgage, & that of John S. Judd, were as follows: J. H. Butler fell into the habit of drinking too much, &,
128 his affairs into disorder, he had borrowed of me a few hundred dollars from time to time on his notes merely as a temporary accom'odation. When I discovered his condition, I at once set to work to induce his reform, & he left off drinking & is trying to put his affairs to rights again. If he does so I shall be very glad, for he is an old client and a very able man. He is paying me some money along from time to time, which, if he goes into bankruptcy, I will app'y on my debt, but which I will pay over to you on your interest if he succeeds. This helps me, and, as your security is ample, does not hurt you, provided I make you good for the delay, which I of course will do. A. C. Leonard, who now owns the John S. Judd farm, has some business matters in my hands out of which he expects to receive money to pay his interest to you, which matters I ought to have attended to in season to have met the interest then due, but my ill health and great load of business have prevented it thus far. I prefer to
129 pay the interest on the interest or advance the money rather

than burden myself with the business now. When I received no reply to my former letter asking you to defer payment of interest by both J. H. Butler and A. C. Leonard my first impulse was to send you the interest for both, but I was not well enough to do even this, in addition to other calls on my time that I could not put off. But I do not like to advance much money for any one just now, when I am expecting to use all I can get in the stone business; and on this account I write you now the reasons of my asking what I did. I have asked a good many favors of this kind, and it will be all just right if you now say you want to keep these with your other matters all snugged up prompt and right. Please write me, and I will do just as you tell me and at once, on receipt of your letter. Your Jeff. Co. farm' are among the things I do not neglect. They will both be taken care of this year, and put in the way of being ultimately sold. I do not trouble you with details, but will advise you of results when I reach them.
130 I paid Morgan, the sheriff, his bill, some $89; I think a little too high, but I thought best to pay it. We are now just organizing our sandstone company—Parmiter, the old quarryman, Cox, Watkins, Foster, and I. If you, or you and Mr. Dunkee, will join us, contributing to the stock $10,000, or as much less as you choose, and becoming trustees or not with us, *or not* as you prefer, I will be right glad to have you do so, and I know all the rest will feel the same. Although I have said nothing to them about it, I do not ask you to accept this offer, but I make it, and if you wish to accept it I shall be gratified at your association with us, and will advise the others of the fact. In case either or both of you will become trustees, I will send you for signature the papers for incorporation, which all the rest have already signed, and which I retain only to hear from you before filing in the proper offices. My health is quite poor, resulting wholly from continued overwork. I am, however, unloading, and in a few
131 weeks hope to be a comparatively free man. My law business works smooth and right, with only oversight from me. The quarry business assumes a shape easier for me every day. I hope to spend the summer mostly out of doors, giving only oversight to matters in the office. When do you go to California? I write this at Canton, where I am called as a witness.

Yours, very truly,

S. B. GORDON.

Wrote this letter, dated April 11th, to Gordon. Offered and received in evidence, and is as follows:

21 BEAVER ST., N. Y., *April* 11, 1873.

S. B. GORDON, Esq.,
Potsdam, N. Y.:

DEAR SIR: Yours of the 9th is rec'd. In regard to Butler, Judd and Leonard, interest may remain at present unpaid, but I shall hold you responsible for the same. I hope my Jefferson Co. business will be looked after, and the land sold as soon as possible. You send me Morgan's bill and I will pay it. I do not wish to engage in business now of any kind. I think you will make money out of the stone business. I hope
132 your health will improve. Give up all your business and come here and board at the N. Y. Hotel, and I will cure you in one month. I shall not visit California this year. My business will not

permit. Mr. Dunclee says he is not prepared to invest in the stone business.

Very truly yours,

JOHN G. BUTLER,
Per D.

Received this letter from Gordon, dated Aug. 19th, 1873; offered in evidence. (Objected to by defendants. Objection sustained.)

Plaintiff offers letter to show action of defendants in pursuance of their conspiracy to get other and more money of plaintiff.

(Objected to; objection sustained.)

I received this letter from Gordon dated 23rd of Aug., 1873.

(Objected to as immaterial. Objection sustained.)

Received another from him of same date.

(Objected to; objection sustained.)

In January, 1874, I went from New York City to St. Lawrence County. I saw Foster at hotel in Canton; saw Gordon at Canton in jail. Watkins at Potsdam. I had private conversation with Foster about
133 Gordon, and about certificate. Talked about Gordon's being confined in jail. Foster told me what he was confined for; that he had not done right. I said it was unpleasant. I asked if there was not an engagement between his son and Gordon's daughter; he said there was. I asked Foster if he had any doubt if I foreclosed mortgage that it would pay me the principal and interest of the mortgage; he answered, "When I made that appraisal I made it supposing the property was going to be developed;" nothing further. Saw Gordon at jail; saw Watkins at hotel in Potsdam. I asked Watkins if he thought in case of foreclosure of mortgage, property would sell to pay my debt; he said he thought it would if the quarry was worked and the business went on. I saw him next day at his house; said he had changed his mind; he thought it doubtful if it would sell for enough to pay me. I asked Walkins about the appraisal; he said when he made the appraisal he supposed it was to get up a stock company, and did not know it was to get money from me; nothing further. Nothing
134 said as to who drew this appraisal. I had a talk with Gordon after he got out of jail. Gordon called at my room at the American House in Potsdam in the summer of 1874. I said to him, "What was that certificate got up for; was it to get money out of me?" And he said, "Yes, I suppose it was." I then said, "Didn't Foster and Watkins know it?" and he said, "I suppose they did."

(The defendants Foster and Walkins duly objected in time to the conversation between Gordon and Butler as incompetent and immaterial, which objection was overruled, and exception granted to defendants, Foster & Watkins; and after the giving the testimony the said defendants moved to strike out the last part of answer as being incompetent and immaterial; which motion was denied, and an exception granted to the defendants Foster and Watkins. But these rulings were made by the court, that the testimony was admitted as against the defendant Gordon and not against the defendants Foster and Watkins.)

I was present at the sale of the property on my mortgage. I
135 saw Foster crossing the street near by at the time of sale. (Paper is here shown witness, who identifies his signature thereon.) I received nothing on the mortgage except what I got out of the foreclosure. I got interest up to first of July, 1878; from January 23rd to July 1st I received interest. That is all I received except what I got on foreclosure.

Cross-examination of the witness Butler:

Since 1855, I have been accustomed to do business in St. Lawrence County, and before that time, first began to do business there in 1857; was a general wholesale liquor dealer from 1857 to 1866, excepting 1865; I traveled in St. Lawrence County; I traveled about and solicited trade; was at Potsdam about twice a year; have visited Colton and solicited trade there; seldom went there from 1857 to 1873; was there three or four times; Colton is about ten miles up Racket River; in passing on either side, you have to go near quarries; in passing from Potsdam to Colton, I passed on road quite a distance from stone; I know Falls lot; I never noticed quarries; saw stones; have known of
136 Potsdam sandstone; saw church on the island build of sandstone and stone block; don't know it was Potsdam sandstone; saw jail at Canton built of stone; have observed normal school building and Presbyterian church at Potsdam; I supposed they were built of the stone; town hall is also built of the same stone; have observed that the flagging stone was of stone; it looked like sandstone. I knew Gordon first in 1861. He first did personal business for me in 1867. He djd business for me in Potsdam. The business was collecting for Butler and Donecklee; he collected in Massena and Hani'ond. He effected several loans for me. I don't remember the last collecting business Gordon did for us. In case of loans effected by him for me, I don't remember whether money was sent to Gordon or directly to borrowers. I loaned $8,000 on Judd farm through Gordon, also to Butler through Gordon's application for him about $5,000. I also loaned Gill in Canton, $5 to $8,000; a man by the name of Smith had $5,000 through Gordon. Smith lived in Stockholm. I loaned to others
137 through Gordon; to a man by the name of O'Brien, $5,000. I don't remember of sending him money in checks, or check in advance of application to loan. He received and transmitted interest money to me. He was my attorney when I employed one. We employed Gordon to sell and let a hotel in Copenhagen. Fredericks had some money from me. I employed Gordon to assist me; he went to Watertown for me. He assisted some one else in the Fredericks matter. I had a mortgage against Benton, near the lake; also one against a man by the name of Farr, in Jefferson County. (Letters shown witness.) I wrote this letter of May 16th, 1870, to Gordon. Letter offered and received in evidence, and is as follows:

19 BEAVER ST., NEW YORK, *May 16th*, 1870.

S. B. GORDON, Esq.,
Potsdam, N. Y.:

DEAR SIR: Are you going to buy those mortgages for me? I would like to know soon. I have some $16,000 lying idle, and would
138 like to make an investment of some kind.

Yours truly,

JOHN G. BUTLER,
Per GEO. RACK.

I also wrote this letter of September 22, 1870, to Gordon. Letter offered and received in evidence, and is as follows:

HAVERHILL, N. H., *Sept. 22, '70.*

S. S. GORDON:

I have $12,000.00 to loan on 5 years in one or two mortgages. First-

class security will be required. Can you make the loan now? You can write me at N. Y.

Yours truly,

J. G. BUTLER.

I had much correspondence with Gordon in 1870. In 1869, I think, I wrote him as many. (It is here conceded by defendants that all the letters in evidence perporting to have been written by him were written by Gordon.)

Letters passed between Gordon and ourselves about starting a bank at Potsdam. I had a conversation with Gordon before Oct. 31, 1872, in reference to sandstone quarries. We tried before that to sell
139 our business to him in New York. I was not willing at that time to trust him with that stock at one year. I wrote this letter to Gordon dated April 9th, 1870.

Letter offered and received in evidence reads as follows:

(Private.)

19 BEAVER ST., NEW YORK, *April 9th*, 1870.

S. B. GORDON, Esq.,
Potsdam, N. Y.:

DEAR SIR: Yours of the 16th inst. is received. In answer to your inquiry I will say that Butler & Dunklee do intend to sell out, and will do so at their earliest convenience; but you must treat this as strictly confidential. The fact is I care nothing about doing any more business. B. & D. will sell you their goods and fixtures, and trust you one year, with security, if you want to buy the concern.

Yours truly,

JOHN G. BUTLER,
Per G. R.

In 1872, at time (28) of loan, I did not know whether he was solvent or not, after his debts were paid; I don't know how I considered him at all. I did not rely on personal responsibility of Gordon at all in making the loan. After I loaned him the $10,000 I did im-
140 prove my opinion as to his solvency. I had an opinion before he was in jail—after he went into the sandstone business—I had an opinion as to his solvency. I had certificate in my possession January 7th, 1873, and had it until 23d of January. I don't remember whether I sent mortgage to Gordon to have it corrected; can't tell when; the orchard lot was not put in; I don't remember whether I sent back with the check the mortgage to have orchard lot put in. I made up my mind the transaction was not closed when I sent him the check; don't know as I had the mortgage after I sent the check; I cannot say it was or was not enclosed in letter. I did not make this loan out of friendship to Gordon; I did not make all the loans to Gordon, out of personal friendship to him.

Letter of Sept. 5, 1873, offered and received in evidence is as follows:

N. Y. *Sept.* 5, '73.

S. B. GORDON, Esq.:

DEAR SIR: Yours of 4th rec'v'd. I have not rec'd Benton interest. I cannot send the money. Look to my last letter—that is all suf-

ficient. You do not comply with my request. You have no
141 right to press me for loans. Every loan made has been made out of friendship. No' when will you cease to press me? Perhaps if you should come here on receipt of this I could name one man in your town or one in Canton with W. & F., that would bring the money. You must comply with my wishes or not have the money. If you do not come here on receipt, on your business, I will send B. & M. by mail.

Yours truly,

J. G. BUTLER,
21 *Beaver St.*

You will make up your mind soon, I hope, that I have firmness.
J. G. B.

I understood it was not to carry on the business. I don't remember whether I understood whether the sandstone business was to be increased or his business. I did not understand it was to develop the quarries; I did understand it was to go into the sandstone business. I did not understand that the sandstone quarried before January 23rd were got from one of the quarries. I did not understand before I sent the money that there was any risk in the business; I did not know that Gordon considered it a risk; did not understand from
142 his letters that he considered it a hazardous enterprise. I understood that these lands were appraised as quarry lands, and that their value depended upon the quarry.

(Letter of Nov. 30, from Gordon, shown witness.)

I should judge he inten'ed to increase the business from his letter; don't know whether I believed it or not. I don't remember whether or not I understood that the lands on which I held the mortgage were to be turned over to the company he was to organize. I don't think I considered at all whether the business was attended with any risk. I did not advise him otherwise than by letter. I said if I owned the quarries what I would do; when I said so I referred to all the quarries which he owned. This was in 1872, in October, I think. I first saw the lands mortgaged to me in July, 1874; I saw the quarry called the Fall lot; the description goes to the center of the river; I did not observe any of bed of river. I saw some stones on the Falls lot; cannot say as to whether they extended whole length. Don't
143 know width of Falls lot; don't know how wide it is on the river. I observed some sandstone there on Cox lot; I saw where they had been digging—where some had been got out. Next lot to Cox lot is the Hicks lot; I might have observed a few stone there. The next is Meacham lot. Quarry lots are the same now as when I first saw them, as far as I know.

(Letter of June 16th, 1870, of Gordon shown witness. Letter offered in evidence by the defendants; objected to by plaintiff as incompetent and immaterial; objection sustained and evidence excluded; to which ruling of the court defendants, by their counsel, severally, duly excepted.)

Letter is as follows:

POTSDAM, *June 16th*, 1870.

JOHN G. BUTLER, Esq.:

DEAR SIR: Since you were here I have been looking over the prospects of money-lending here. Our village, with a population of about

4,000, is in a town of about 8,000, and is the business center of about 40,000 in this and some 15 surrounding towns. The lumber, sandstone, and agricultural business that center here is important and in
144 the hands of the most prudent and wealthiest men in this country. There is only one national bank in the county, and that is here; all the other bankers in the county preferred private banks—the Judsons at Ogdensburg, Averells and Chapman at Ogdensburg, Averells & Anthony at Gouverneur, and some one else at Canton. There is a great call for another bank here, and I have been often urged to start one. It is, in my opinion, the best location in the county. I had much rather have a second bank here than the only one at Canton. Usher's bank has a capital of $162,000. Its usual deposits are $160,000. There could be readily used here $200,000 additional banking capital. If I had $100,000 I think I could use it to advantage, and could safely count on getting an average of $50,000 of these deposits. If I had this amount, $100,000, I would make the management of it my business. If you were to furnish me a much smaller sum I would do the best I could with it, but would still keep my legal business. I find, on ex-
145 amination, that the moneys placed in my hands by Mr. Frederick Fletcher, and of which I spoke to you, were only $3,000 at first, Feb. 2, 1859; were increased a little afterwards, and finally divided January 25, 1863, shortly before I closed business here to go to N. Y., and yielded over 22 per cent. semi-annual interest, i. e., 11 per cent. every six months; but this was a small sum and is of course no criterion by which to judge of any other investment. This did not include any of the moneys I loaned for him on bond and mortgage, but we never lost a dollar or either fund or of their increase. I could safely promise you, or you and Mr. Dunklee, seven per cent. semi-annual interest on any large or *or* small sum you may entrust to my management, and the probability of more. In regard to buying out Butler and Dunklee's business: After buying it out I could not conduct it successfully without some counsel or assistance from yourself or Mr. Dunklee. All of your time and labor I will ask if you retain an
146 interest in just enough to enable me to conduct the business properly. I do not ask you to do any of the business, but simply to see that I do it and do it right; but I want or both of you to retain an interest for one year, even if only an eighth; because, first, it will give me confidence in myself; second, it will retain the present credit of the concern; third, it will secure money to do business with, and fourth, it will be guaranty of success. If I but more than half interest, I do not want to give security outside of the property I buy for over $10,000. I do not say I will not, but simply that if that amount will suffice I prefer it. I appreciate and am obliged to you for your kindness in these and other matters, and I desire, for reasons stated to you, to avail myself of it, but under no circumstances to your disadvantage. If you shall aid *to* me to a position where I can recover my losses I will gladly accept it, provided I can see a certainty that you will lose nothing by it and a probability that it will be to your advantage.

Very truly yours,

S. B. GORDON.

147 (Letter of Gordon dated December 28th, 1871, shown witness. Witness says: "I received it, or the firm of Butler & Dunklee did."

Letter offered in evidence by defendants; objected to by plaintiff as

incompetent and immaterial. Objection overruled, and plaintiffs counsel duly excepted; evidence admitted.)

POTSDAM, *Dec. 28th*, 1871.

MESSRS. BUTLER & DUNKLEE:

DEAR SIRS: I want you help me carry out a business project, of which I send you enclosed a statement. About 18 years ago my attention was called to the quarries of Potsdam sandstone near here, and after investigation, being convinced of their great value, I bought one and have ever since, whenever opportunity offered, secured additional quarries with a view of ultimately running and working the whole, until I now own or control all that I deem essential to my purpose, and other quarries are desirable almost wholly & only for the purpose of shutting out competition. I have for several years past been en-
148 deavoring to introduce this stone into the city markets, but never with sufficient success to warrant me, as I thought, in attempting to work the quarries myself until now. The enclosed statement gives my views of the prospect; views adopted after years of careful personal observation in New York, Albany, Troy, Ottawa, Montreal and Chicago, besides all the principal places within 100 miles of here, all of which places I have visited, and most of them repeatedly, in my efforts to introduce the stone. In the sale of the quarries to the new company I expect to make something in stock above their cost but not a dollar in money. My profits I expect to derive wholly from the success of the enterprise, that is all the risk I dare take; for while my matured judgment is that it will be successful, the same judgment assures me that all human undertakings are liable to fail; knowing this I want others to share with me the risk; and yet, being confident of its success, I want as my associates those I deem my friends, and whom I would of all the world least wish to see
149 loose their money. I wish, therefore, you would each take $5,000 of the stock, and pay thereon $2,500, each at such times as it shall be wanted, between, say March 1, and July 1, next. All the stock will be issued as fully paid up and no liability whatever attaches, except for wages of laborers, all of whom will be paid every week. I would also to have you both act as trustees or directors of the co. I understand, as you will, that if you take the above amounts of stock you take them on my advice. I also offer you, before and in preference to any one else, the remaining $15,000 of the $25,000 of the stock to be be taken elsewhere than here, and I would be glad to have you think best to take it. You see something by the enclosed statement what has been done by Parmiter, a good fellow, quarryman and salesman, but a poor business manager, with no capital, rubbing-bed or other suitable machinery, and no assistance except common laborers, and except such aid as I have occasionally given in introducing the stone into New York, Albany and elsewhere. My offer of 10 per cent guaranty
150 holds good for all stock whose owner chooses to give me the option of buying it. Please write me as soon as convenient and oblige, Yours truly,

S. B. GORDON.

(Letter of April 16th, 1870 Butler to Gordon, shown witness, who says: "I wrote this letter." Letter offered in evidence by the defendants. Ojbected to by the plaintiff as incompetent and immaterial. Objection sustained, and evidence offered excluded; to which ruling of the court the said defendants, by their counsel, severally duly excepted.)

19 BEAVER ST., NEW YORK, *April* 16, 1870.

S. B. GORDON, Esq'r., *Potsdam, N. Y.:*

DEAR SIR: Yours of the 13 & 15 are received. I am ready to take the $2,000 mortgage, if I can buy the $1,000 mortgage to suit. That is, if you are satisfied that the farm is worth $6,000, and there are no other leins on the property. I should want a county clerk's search. When is the $1,000 mortgage due, and how much interest is ther' due on it? What is the date of the $2,000 mortgage? When you find the right kind of mortgages, such as I want, and you know what they
151 are, write me and I will reply to you. In relation to the business of Butler & Dunklee, we have both made up our minds to go out of business. We will sell to you on the terms stated in our letter of April 9th, '70. We will remain with you a few months and give you all the information and knowledge of the business we possess. Perhaps you can find some of your acquaintances that would go in with you. If we were going to continue in the business we should be happy to take you in as a partner on the terms you state. Let me hear from you soon.

Yours truly,

JOHN G. BUTLER,
Per G. R.

(Letter of December 28th, 1871, Gordon to Butler, shown witness.)

Question. Did that letter contain statement therein referred to?

Answer. Don't remember whether it did or not. I don't remember of ever receiving a letter referring to an enclosed statement that did not contain the enclosure. I don't remember of receiving from Gordon any statement of plans, statement of any in. I swear I never received it to my knowledge. Don't think I ever received it; will not
152 swear positively that I did not receive it.

(Letter January 16th, 1873, Butler to Gordon, shown witness, who says: "I wrote letter." Letter offered and received in evidence.)

19 BEAVER ST., N. Y., *Jan.* 16, 1872.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: Your letter about the sandstone scheme reached me when absent. I thank you for the preference you have shown in offering me the opportunity to invest, but must decline to have anything to do with it, as I am going out of business and must have my money where I can manage it easier. I trust, however, that you and your friends will realize a fortune out of the Potsdam sandstone, but believe you would do it handier if the quarries lay in a democratic district.

Yours resp'y,

JOHN G. BUTLER,
Per D.

I don't think, according to my way of doing business, if it had not contained statement I would not have referred to it in my answer.
153 (Letter, Butler to Gordon, dated May 16th, 1870, shown witness, who says: "I wrote letter." Letter offered in evidence.)

19 BEAVER ST., NEW YORK, *May 16th*, 1870.

S. B. GORDON, Esq'r., *Potsdam, N. Y.:*

DEAR SIR: Are you going to buy those mortgages for me? I would

like to know soon. I have some $16,000 laying idle and would like to make an investment of some kind.

Yours truly,

JOHN G. BUTLER,
Per GEO. RACK.

Question. Did you not understand when you took your mortgage that all the Potsdam sandstone which has been and were being taken out came from the Parmeter quarry?

Answer. I did not so understand it.

(Letter, September 22nd, 1870, Butler to Gordon, shown to witness, who says: "I wrote the same." Letter offered and received in evidence.)

HAVERHILL, N. H., *Sept.* 22, 1870.

MR. GORDON:

I have $1,200 to loan on 5 years in one or two mortgages. First-class security will be required. Can you make the loan now?
154 You can write me at N. Y.

Yours truly,

J. G. BUTLER.

Can't say whether I regarded Gordon as a man of great influence at Potsdam 24th of August, 1870, or not. That is all the answer I can give. I regarded as a man of influence in a certain circle. Don't remember whether before I sent check I procured search or abstract of title or had one furnished by Gordon. I was to have it, but think I did not have any. Don't remember whether he got one or not before I saw him in jail. I considered him a very honorable, trustwor'y man when I sent him the $10,000.

Question. When you loaned him the $10,000 did you not understand he was kept from working quarries from want of means?

Answer. I answer that I don't remember anything about it. I did not understand that he was not working these quarries at that time. I did not understand that it was to be used in working these
155 quarries. I don't think I understood that it was to be used for that purpose. I understood that the quarries were to be worked to carry on the business. I did not understand before the loan that all the stone he had sold came from one of these quarries.

When I received the letter I don't remember whether I understood that all the stone came from one of the quarries. I did not suppose all the stone had been taken out of his own quarry. I did not notice in particular that he stated they all came from one quarry.

(Letters of November 7th & 26th shown witness.)

Question. Did you not between these receive two letters from Gordon?

Answer. I did not.

(Letters from Butler to Gordon, November 27th, 1872, offered and received in evidence, N. Y., Nov. 27, '72.)

J. B. GORDON, Esq.:

DEAR SIR: Your three letters I have received on my return here. I have had two "applications" for the farm. What did Vickery
156 say to you about Fredericks' farm title, &c.? Why did he loan the money on such a search? You, of course, talked this over

with V.? What course do you advise me to take with V., if Fredericks' title is not all correct?

Yours truly,

J. G. BUTLER.

Witness further says:

I have been familiar with value of farms in St. Lawrence County.

Question. Did you ever know any agricultural lands in St. Lawrence County to have been valued at from $300 to $1,200 per acre?

Answer. No; I did not understood in 1872 that the value of mining and quarry lands was speculative. I had no experience in the matter; did not understand from Gordon that they were to some extent speculative; did not understand from Gordon at time of loan that he understood sandstone business to be a business risk any more than any other business. I understood that Gordon was willing I should have a controlling interest in the sandstone business. I did not understand that he wanted the money to consolidate all the quarries
157 and make them valuable. I did not understand at the time of loan that the quarries in the certificate had cost much less than the appraisal.

(Letters of November 8th and 30th, 1872, from Gordon to Butler, shown witness, and witness says:)

From last letters I did not understand, did not from his correspondence generally, that all did, but that some did. Gordon indicated in some of his correspondence that he estimated them much higher than certificate. I did understand at the time of loan that a company was to be formed, and that Watkins & Foster would be members. And that this money was to be used in developing those quarries. I never called upon Gordon for a certificate of the value of the quarry property. Gordon and I never settled; saw Foster before I saw Watkins on the same day. I saw Foster at Canton. I saw Watkins at Potsdam in the middle of the afternoon; did not see Foster same day to speak to him; might have seen him pass; saw Watkins at his house.

Redirect examination of John G. Butler:

158 After looking at mortgage, I now say I did not return it after I received it. I did not consider it ended or closed up. I meant that I intended to get another bond and mortgage on the orchard lot.

(The explanation of witness here following was duly and seasonably objected to by the defendants severally as incompetent and immaterial, which objection was by the court overruled; to which ruling of the court the defendants, by their counsel, severally duly excepted.)

From January 14, 1873, to July, 1873, all I loaned realized 11¼ per cent. interest; got from him only 7 per cent. interest, and supposed I got as good security, and only that per cent., and when I accom'odated him in that way, it was the definition of friendship that appeared in my letter. I understood that this letter of November 8th, 1872, did not refer to any of the quarries in the certificate.

Recross examination of John G. Butler:

When I made the loan to Gordon I was friendly to a certain
159 degree with him. (The plaintiff here offered in evidence the judgment-roll in a certain action in the supreme court of the State of New York, wherein the said John G. Butler was plaintiff, and Samuel B. Gordon and Jane Ann Gordon, his wife, The Potsdam Sandstone Company, Tiras H. Ferris, Michael Lynch, Aldis L. Lockwood, George Kingston, and John A. Vance, assignee of the said defendant Samuel

B. Gordon, for the benefit of creditors, were defendants; which judgment-roll consists of the following papers:

First, a certificate of E. J. Chapin, sheriff of the county of St. Lawrence, by Wm. E. Tanner, his deputy, of service of the summons in said action upon the defendant Samuel B. Gordon, at Canton, on the 14th day of March, 1874.

Second, a certificate of said sheriff by Wm. E. Tanner, his deputy, of the service of the summons and notice of object of action in said action upon the defendants therein, Tiras H. Ferris, Jane Ann Gordon, Michael Lynch, Cornelius Lynch, John A. Vance, The Potsdam Sand-
160 stone Company; on the said Ferris, Jane Ann Gordon, the defendants Lynch and the defendant Vance on the 15th day of March, 1874; and on the defendant the said Sandstone Company on the 3rd day of April, 1874.

Third, a certificate of the said sheriff, by Daniel P. Haskell, his deputy, of the service of the summons and notice of object of action upon the defendant in said action, Aldis L. Lockwood, on the 6th day of April, 1874.

Fourth, a certificate of said sheriff, by Daniel P. Haskell, his deputy, of the service of the summons and notice of object of action in said action upon the defendants Kingston therein upon the 3rd day of April, 1874.

Fifth, the summons in said action in form of law.

Sixth, a notice of object of action in due form of law directed to said defendants, and each of them, setting forth that said action was brought for the foreclosure of a certain mortgage executed by Samuel B. Gordon and Jane Ann, *and* his wife, to the said John G. Butler, bearing date the 1st day of January, 1873, and duly recorded in
161 St. Lawrence County, on the 18th day of January, 1873, upon premises therein described, which premises are and are known as the following quarry lots in Potsdam, in said county, to wit:

The Falls lot, containing about 8 acres.
" orchard lot, containing about 5 acres.
" Benj. Cox lot, containing about 16 acres.
" Hick's lot, containing about 15 acres.
" Meacham lot, containing about 7 acres.

Excepting and reserving, however, the said orchard lot of about 5 acres, and that personal claim is made against any defendant, except the said defendant Samuel B. Gordon.

Seventh, the complaint in said action, duly verified by the affidavit of the said John G. Butler, plaintiff, setting forth, among other things, that on the 1st day of January, 1873, the said defendant Samuel B. Gordon, made and executed under his hand and seal a bond in the penal sum of twenty thousand dollars, conditioned for the payment to the said John G. Butler of the sum of ten thousand dollars by the said Samuel B. Gordon within three years from said date, with inter-
162 est payable semi-annually, and that in case said interest or any part thereof remained unpaid for the space of twenty day' after the same shall by the terms of the bond become due and payable, then the whole principal sum, with the interest, shall by the option of the said obligee become due and payable forthwith, and to secure the payment of the said principal sum of ten thousand dollars the said defendants Samuel B. Gordon and Jane Ann Gordon then and there, to wit, on the said 1st day of January, 1873, duly executed over their hands and seals a certain indenture of mortgage, and acknowledged the same, by which the said defendants duly mortgaged certain lands in said

mortgage described to the said John G. Butler, being the same lands in the notice of object of action described, upon the condition stated in the said bond, and in case default be made in the payment of the principal sum, or of the interest, that then the said mortgagee is authorized to sell the said premises, or so much thereof as shall be necessary to satisfy the amount due on said bond and mortgage, rendering the overplus, if any there be, to the said Samuel
163 B. Gordon, his heirs, administrators, or assigns; that default has been made in the payment of the semi-annual interest which by the terms of said bond and mortgage became due on the 1st day of January, 1874, which sum was not paid on said date nor within twenty days thereafter, by means of which default, and at the option and by the election of the obligee, the whole of the principal sum in said bond and mortgage secured to be paid, with the interest thereon, became due and payable; that on the 22nd day of January, 1874, there became due and payable on the said bond and mortgage the sum of ten thousand dollars and the interest thereon from the 1st day of July, 1873; that no proceedings have be'n had at law or otherwise to recover the sum due on said mortgage of the said defendant Samuel B. Gordon; that the said defendant Tiras H. Ferris, Michael Lynch, Cornelius Lynch, Wildis L. Lockwood, George Kingston, and John Kingston are judgment creditors of the said Samuel B. Gordon by judgments
164 duly docketed in the office of the clerk of said county of St. Lawrence; that the defendants The Potsdam Sandstone Company and the defendant John A. Vance have or claim some interest in the mortgaged premises aforesaid, which judgments and interests, if any, were obtained and have accrued subsequently to the lien of the said mortgage.

That the said defendant Jane Ann is the wife of the said Samuel B. Gordon and a party to said mortgage, wherefore the said plaintiff demands judgment that the amount secured by the said mortgage, principal sum and interest, be adjudged due and payable; that the said mortgage be foreclosed; that the said defendants, and all persons claiming under them or either of them subsequently to the commencement of this action, be barred and foreclosed of all right, title, claim, and equity of redemption in and to the aforesaid mortgage premises; that a sale be had of the same under the direction of the court; that *for* the proceed' of said sale the plaintiff be paid the amount due him on said mortgage for interest and principal and the costs of said
165 foreclosure and sale, so far as the amount of the moneys arising from said sale properly applicable thereto be sufficient to pay the same; and that in case of a deficiency after applying all the moneys properly applicable to such payment of principal, interest, and costs, that then the said Samuel B. Gordon be adjudged the same.

Said complaint was filed March 12th, 1874, in the office of the clerk of the county of St. Lawrence.

Eighth. The notice of pendency of said action, containing the names of the said parties to said action, plaintiff and defendant; a statement of the reasons for the bringing and the matter involved in said action; a description of the mortgaged premises affected thereby in the form prescribed by the code of procedure of the State of New York, which notice of the pendency of said action was duly filed and recorded in the office of the clerk of St. Lawrence County on the 12th day of March, 1874.

Ninth. The affidavits of William C. Cooke, attorney for said
166 plaintiff, setting forth among other things the filing and date of

filing of said complaint and notice of pendency; that said complaint had not been amended since the commencement of this action; that the summons and notice of object of action has been served upon all of said defendants; that none of said defendants are infants or absentees; that more than twenty days has elapsed since service upon all of said defendants, & that none of said defendants have appeared in said action or served answer or demurrer therein.

Tenth. An order granted at a special term of the supreme court, held at the chambers of Justice James, in Ogdensburg, on the 5th day of May, 1874, granting to said plaintiff a further allowance of two hundred dollars to said plaintiff.

Eleventh. Decree of foreclosure and sale granted at special term aforesaid in said action. Such sale to be made under the direction of Worth Chamberlain, esquire, referee, and directing, in case of a deficiency on such sale, the said Samuel B. Gordon pay the same.

167 Twelfth. Referee's report of sale of said premises showing among other things that the said premises were struck down to the said John G. Butler for the sum of fifteen hundred dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same by the clerk by stipulation.

(The said defendants severally objected to the admission in evidence of the said judgment-roll as incompetent, immaterial, and irrelevant, which objections were severally overruled; to which rulings the said defendants severally excepted.

Specific objection was made by the defendants severally to the report of the referee and judgment as to deficiency as incompetent and immaterial, which objections were overruled as to referee's report so far as it shows the amount realized on the mortgage, which was $1,500 less $542.98 costs, and the judgment for deficiency was excluded; to which admission of referee's report, defendants severally except.)

Plaintiff offers in evidence referee's deed in foreclosure. The

168 same received in evidence and is as follows:

This indenture made this 18th day of July, in the year of our Lord one thousand eight hundred and seventy-four, between Worth Chamberlain, referee in the action hereinafter named, party of the first part, and John G. Butler, of the city of New York, party of the second part:

Whereas at a special term of the supreme court of the State of New York, held at the city of Ogdensburg, on the fifth day of May, one thousand eight hundred and seventy-four, it was among other things ordered, adjudged, and decreed by the said court in a certain action then pending in said court between John G. Butler, plaintiff, and Samuel B. Gordon and Jane Anne Gordon his wife, of the Potsdam Sandstone Company, Tiras H. Ferris, Michael Lynch, Cornelius Lynch, Aldis L. Lockwood, George Kingston, John Kingston and John A. Vance as assignee of the said defendant, Samuel B. Gordon, for the benefit of creditors, defendants, that all and singular the premises described

169 in the mortgage executed by Samuel B. Gordon, and Jane A. Gordon, his wife, of Potsdam, St. Lawrence Co, N. Y. to John G. Butler, of the city of New York, and recorded in St. Lawrence County clerk's office in Liber 66 A at page 7, and being the same premises mentioned in the complaint in said action and in said judgment described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold seperately without material injury to the parties interested, be sold at public auction according to the course and prac-

tice of said court by or under the direction of the said Worth Chamberlain, who was appointed a referee in said action and to whom it was referred by the said order and judgment of the said court among other things to make such sale, that the said sale be made in the county where the said mortgaged premises, or the greater part thereof are situated, that the said referee give public notice of the time and place of
170 such sale, according to the course and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale, that the said referee execute to the purchaser or purchasers of the said mortgaged premises on such part or parts thereof as shall be sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas the said referee, in pursuance of the order and judgment of the said court, did on the eighteenth day of July, one thousand eight hundred and seventy-four, sell at public auction at Bridges Hotel in the town of Potsdam, St. Lawrence county, N. Y., the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order, at which sale the premises hereinafter described were struck off to the said party of the second part for the sum of fifteen hundred ($1,500) dollars, that being the highest sum bidden for the same.

Now this indenture witnesseth that the said referee, the party of
171 the first part, to these presents, in order to carry into effect the sale so made by him as aforesaid in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of money so bidden as aforesaid having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part all that certain piece or parcel of land situate in the town of Pierrepoint, in said county, and bounded thus: Beginning in the middle of the highway leading from Potsdam Village to Colton, on the westerly side of Racket River, at the intersection of said highway with the middle of the highway called Mill st., in the village of Ellsworth, and running thence easterly along the middle of said street about twenty-five rods to an angle therein; thence easterly directly to the middle of Racket
172 River about 25 rods; thence northerly along the middle of said river as it winds and turns about 168 rods to the town of Potsdam aforesaid; thence westerly along the southerly bounds of Potsdam aforesaid about 100 rods to the middle of said first mentioned highway; thence southerly along the middle thereof about 141 rods to the place of beginning, containing about 51 acres of land, being the northeasterly part of mile lot No. 9, and being the following named quarry lots and the whole thereof, to wit:

The Falls lot, containing about eight acres.
The Orchard lot, containing about five acres.
The Ben. Cox lot, containing about sixteen acres.
The Hicks lot, containing about fifteen acres.
The Meacham lot, containing about seven acres.

Excepting and reserving, however, the said Orchard lot of about five acres.

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed unto the said party of the second part, his heirs and assigns, forever.

In witness thereof the said party of the first part, referee as

aforesaid, hath hereunto set his hand and seal the day and year first above written.

WORTH CHAMBERLAIN, *Referee.* [L. S.]

Sealed and delivered in presence of—
W. C. COOK.

STATE OF NEW YORK,
St. Lawrence County, ss:

On this 21st day of July, in the year one thousand eight hundred and seventy-four, before me, the subscriber, personally appeared Worth Chamberlain, to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

D. M. ROBERTSON,
Notary Public.

(Endorsed): Referee's deed in mortgage cases. Worth Chamberlain, referee, to John G. Butler.

ST. LAWRENCE COUNTY, *ss:*

Recorded on the 24th day of July, 1874, at 9 o'clock a. m., in liber 99 B. of deeds, at page 41, &c., and examined.

M. N. RALPH,
Dep. Clerk.

(Plaintiff offers in evidence two several notices to defendant' Foster & Watkins, one dated April 8th, 1874, the other June 30th,
174 1874. The said defendants, by their respective counsel, severally objected to each of said notices and their admission in evidence, as incompetent, immaterial, and irrelevant. The court overruled each of said objections of said defendants, and admitted said notices in evidence. To the rulings of the court, and to each of same, the said defendants, by their respective counsel, severally excepted.)

To HENRY WATKINS and E. W. FOSTER:

GENTLEMEN: You and each of you will please take notice that on or about the first day of January, 1873, I loaned to Samuel B. Gordon, of Potsdam, N. Y., the sum of ten thousand dollars for the term of three years from the said first day of January, 1873, on interest, to be paid semi-annually on the first day of July and January, until said principal should be paid, upon the condition mentioned in the bond and mortgage hereinafter mentioned.

That, to secure the payment of said sum of ten thousand dollars, so loaned by me to said Gordon, and the interest thereon, Gordon
175 executed and delivered to me his bond in the penal sum of twenty thousand dollars, conditioned to pay to me my certain attorney, executors, administrators or assigns the said sum of ten thousand dollars three years from the date of said bond, and interest thereon semi-annually on the first day of each July and January until said principal shall be paid, both principal and interest payable at the National Bank of the Republic in the city of New York; and it was further agreed and provided that in case said interest money, or any part thereof, should remain due and unpaid for the space of twenty-five days after the same became by the terms there' *became* due and payable, that then the whole principal sum secured to be paid, together with the interest thereon, should, at my option, become due and pay-

able forthwith. At the same time the said Samuel B. Gordon and Jane Anne, his wife, executed and duly acknowledged and delivered to me a mortgage bearing even date with said bond, upon certain lands and real estate situate in the town of Pierrepont, N. Y., particularly
176 described in said mortgage and being the following-named quarry lots and the whole thereof, to wit:

The	Falls	lot, containing	about	8	acres.
"	Orchard	"	"	5	"
"	Benj. Cox	"	"	16	"
"	Hicks	"	"	15	"
"	Meacham	"	"	7	"

Excepting and reserving, however, the said Orchard lot of about five acres.

That the said mortgage contained the same condition substantially as the bond, and prov'ed that if any installment of principal or any part thereof or any interest-money or any part thereof secured by said mortgage to be paid should remain due and unpaid for the space of twenty days after the same should by the terms thereof become due and payable, that then and in that case the whole principal sum secured to be paid, together with the interest thereon, should, by my option, become due and payable forthwith; and the said mortgage also contained the usual power of sale; that this mortgage was duly
177 recorded in the office of the county clerk of St, Lawrence County on the 18th day of January, 1873, in book No. 60 A of mortgages, page 7, &c.

That such bond & mortgage were given to me by said Gordon in pursuance of an agreement by him to furnish me with good and ample sufficient real-estate security for the repayment to me of the money to be loaned.

That prior to the said loan, and on or about the 12th day of December, 1872, you made, signed, and delivered to said Sam'l B. Gordon a written certificate of apprisal of the value of the said five lots or quarry lots of land described in said mortgage, including three other lots, of which certificate of apprisal the following is a copy, to wit:

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence County, New York, and acquainted with the sandstones quarries about three miles south of Potsdam Village; that he is acquainted with the lots there owned by S. B. Gordon and situated on the westerly shore of Racket River.

178 "That said lots are rightly represented on the annexed diagram.

(A diagram annexed to said certificate, but omitted in this notice,) have on them the buildings, and in his best judgment contain the quantity of land, and are worth the sums severally below stated, to wit:

No. 1.	Falls	lot, about			8	acres,	worth.....	$8,000
" 2.	Orchard	"	"		4	"	"	$5,000
" 3.	Cox	"	"		16	"	"	$8,000
" 4.	Hicks	"	"		15	"	"	$5,000
" 5.	Meacham	"	house & barn,		7	"	"	$5,000
" 6.	Hale	"	"	" "	10	"	"	$5,000
" 7.	Parmiter	"		"	17	"	"	$8,000

" 8. Train	"	" 26	"	"	$8,000
Total 8 lots		103		.....	$48,000

"Dated Potsdam, 12 Dec'r, 1872.

"(Signed) "H. WATKINS.

"(Signed) "E. W. FOSTER."

That at the time of said loan, and during the negotiations thereof, Mr. Gordon presented to me the said certificate as evidence of the value of the said lots described in said mortgage and mortgaged to me, and of their sufficiency as an ample security for the payment of the
179 money so loaned, and I made the said loan to the said Gordon relying upon the said certificate of apprisal, and the apprisal so made by you, and upon the truth thereof, knowing you to be residents of Potsdam and that you were well acquainted with Mr. Gordon.

I took the mortgage and advanced the money upon the credit of the certificate and the representations therein made.

That Mr. Gordon neglected and failed to pay the semi-annual interest due on the said 1st day of January, 1874, and neglected and failed to pay it for the space of twenty days thereafter. Upon the non-payment of said interest within the space of twenty days after the 1st day of January, 1874, I elected that the whole principal sum and the interest thereon from July first, 1873, should become and be deemed due and payable, and have commenced proceedings for the collection of said principal sum and interest by foreclosure of the said mortgage and sale of said mortgaged premises, by action in the supreme court, that
180 I intend to sell said mortgaged premises under the said foreclosure, according to law, at public auction, apply the proceeds of sale to the costs and expenses of such sale, and the balance or residue towards the payment of the sum then due and unpaid on said bond and mortgage, and the record to you for any deficiency that may exist after the proper application of the moneys arising on said sale in the sum secured to be paid by the said bond and mortgage, and to hold you responsible and liable for all moneys that may remain due, unpaid, and uncollected on said bond and mortgage, after applying the sums of money realized on said sale, and for all costs, expenses, and damages which I may incur and sustain in the premises or by means or reason thereof.

That upon investigation I find the said mortgaged premises to be grossly inadequate security for the payment of the said loan of ten thousand dollars, and that I was misled and deceived by your
181 said certificate of appr'isal of value, and it was represented to me that you made the appraisal and certificate to enable Mr. Gordon to make a loan on said premises. I would not have made the loan in the absence of your certificate.

That to avoid litigation, costs, and trouble, and to enable you to control the bond and mortgage, and the action already commenced and now pending for the foreclosure of the mortgage, and take such steps or measures as you may deem best and necessary in your own behalf, I hereby offer (as I have before offered), to transfer, assign, and set over to your or your order the said bond and mortgage, and the money secured to be paid thereby, with covenant as to the amount due and unpaid, and to transfer to you the management and control of the said pending action, upon the payment by you to me of the amount due and unpaid on the said bond and mortgage, to wit, ten thousand dollars and interest thereon from July 1st, 1873, and the costs and ex-

penses of said action already necessarily incurred. Notice of the
182 time and place of the sale of said mortgaged premises, under said foreclosure, will be given to you.

Yours, &c.,

J. G. BUTLER.

Dated April 8th, 1874.

CANTON, *June 30th*, 1874.

To E. N. FOSTER and H. WATKINS:

GENTLEMEN:

Take notice that the annexed printed notice *of* is a copy of the notice of sale of the premises mortgaged by Sam'l B. Gordon to me, and known as the Sandstone Quarry Property, to secure the payment of $1,000 and interest, borrowed money, said sale to be made by virtue of the judgment mentioned in said notice, I again offer, as before I have offered in the notice served on you on the 9th day of April, 1874, dated April

Referee's sale.

Supreme court
St. Lawrence Co.
John G. Butler vs. Samuel B. Gordon, Jane Ann Gordon, his wife, the Potsdam Sandstone Company, Tiras H. Ferris, Micohel Lynch, Cornelius Lynch, Aldis L. Lockwood, George Kingston, and John A. Vance, assignee of the said defendant, Samuel B. Gordon, for the benefit of creditors, defendants.

By virtue of a judgment of foreclosure and sale made in the above-entitled action on
183 the fifth day of May, 1874, and duly entered in the office of the county clerk of St. Lawrence County on the 9th day of May, 1874, the subscriber, a referee for that purpose duly appointed, will sell at Bridges Hotel, in the village of Potsdam, St. Lawrence County, on the 18th day of July, 1874, 10 o'clock a. m. of that day, the real estate directed by said judgment to be sold, and therein described as follows:

All that certain piece or parcel of land situate in the town of Pierr'pont, in said county, and bounded thus: Beginning in the middle of the highway leading from Potsdam Village to Colton, on the westerly side of the Racket River, at the intersection of said highway

with the midd'e of the highway, called Mill street, in the village of Ellsworth, and
184 running thence easterly, along the middle of said street, about 25 rods, to an angle therein; thence easterly directly to the middle of Racket River, about 25 rods; thence northerly, along the middle of said river as it winds and turns, about 168 rods to the town of Potsdam aforesaid; thence westerly, along the southerly bounds of Potsdam aforesaid, about 100 rods to the middle of said first-mentioned highway; thence southerly, along the middle thereof, about 141 rods to the place of beginning, containing about 51 acres of land, being the northeasterly part of mile-lot No. 9, and being the following-named quarry lots, and the whole thereof, to wit, the Fall lot, containing about 8 acres; the Orchard lot, containing
185 about 5 acres; the Benj. Cox lot, containing about 16 acres; the Hicks lot, containing about 15 acres; the Meachom lot, containing about 7 acres, excepting and reserving, however, the said Orchard lot of about 5 acres.

Dated this 4th day of June, 1874.

WORTH CHAMBERLAIN, *Referee.*
W. C. COOKE, *Attorney for Plaintiff.*

8th, 1874, to transfer, assign, and set over to you, or to your order, the said bond and mortgage mentioned and described in said notice of April 8th, 1874, and upon which a judgmend of foreclosure has been rendered and the premises advertised for sale in and by the annexed printed notice, and also the judgment or decree of foreclosure and sale duly rendered upon said mortgage, with covenant as to amount due and unpaid, upon the payment by you to me of the amount due and unpaid on said judgment, with the expenses of the foreclosure, and again offer to allow you to direct and controle the proceedings of such foreclosure and sale, or to dispose of the matter as you see fit.

Yours, truly,

JOHN G. BUTLER,
P'r W. C. COOKE,
His Attorney.

186, 187 GEORGE PARKER, a further witness for plaintiff, sworn, testified as follows:

I am a surveyor, and reside in Governeur. Have been engaged in surveying since 1863; have heard some of the evidence; have made a map of the ledges. Sanford quarry is on the east side of the river. Between Parmiter quarry and Meachum lot there is a valley and brook. The height of the bank at Meachum lot, that is to say, from the water level in the river to the top of the bank, taking the brook on Hale lot as a starting point, bank is $43\frac{33}{100}$ feet high opposite station No. 3, about 10 rods from the place of beginning. Of the Hicks lot I took no measurement, but it is higher at Station No. 9. Between Cox and Orchard lot the heigth is 84 & $\frac{65}{100}$ ft. The next station, Elmen, at the southerly bound'ry of Falls lot, heigth $101\frac{15}{100}$ ft. There is no marked depression there. The bank at Falls lot is very steep and rockey. There are a few trees there and s'rubbery; on a portion of the upper part is dirt, the lower part rock. There were several large trees there, 10 to 15 inches in d'ameter; on a large portion no trees. Made examina-

188 November 10th, 1876, on Falls lot; saw no evidence of quarry there. From bank to Colton road twenty to thirty rods. I think you cannot see any of the stone from road; cannot see Quarry or Orchard lot; can see some of the quarry on B. Cox lot. None of these can be seen from the road. I examined Parmeter Quarry as to dip of stratification. There was a difference in dip of from 2 to 3 degrees. Westerly part sho'ed dip southwest 18 degrees; other part showed the same direction 13 degrees. The red mark of the map indicates the dip, and according to that the upper strata of the Parmiter Quarry would be 316 feet below the surface of the brook at the town line, and 800 feet at the Falls lot. The valley of the brook, as you go up the brook, rises only a very little. It rises from the river, from the mouth of the brook, in all to the highway, 5 feet. The top of the stone is 28 feet above the top of the brook. The top of earth at station No. 3 is 43 feet above starting point. From brook south but little rise for 8 rods. It is 10 to 15 rods from mouth of brook to highway; rise

189 in that distance is not more than 5 feet. The fall on the river is $50\frac{3}{10}$ feet from the surface of brook at the upper end of Falls lot. About same difference in rise and heighth of land. I passed over Meacham lot. I noticed slight indications of stone having been taken therefrom. I noticed there had been some stone broken, and some removed. It had about same appearance of the stratification being broken. On Hicks lot some quarrying had been done and some stone taken out—indications that some had been broken and taken out. On Cox lot I noticed an indication of a quarry having been opened there, a fraction over 12 rods long; much debris thrown off. I made estimate; think 200 *hundred* cords had been thrown off. I saw no earth mixed with them or under them. I should say there had been no quarrying on Orchard lot; same of Falls lot. Back from the river saw is poor for agricultural purposes.

Witness Parker cross-examined for defendand, says:

I am not a civil engineer, though I have worked some at it.

190 Have had no practical experience in quarrying. I have no knowledge of sandstone; don't know that where there are sand seams there is a different pitch. This line of quarries began at Cox's Mills and extends down, I do not know how far. It is over a mile from the beginning to the Clarkson lot. In making the survey I commenced at brook; that was my datum line for levelling. Racket River has

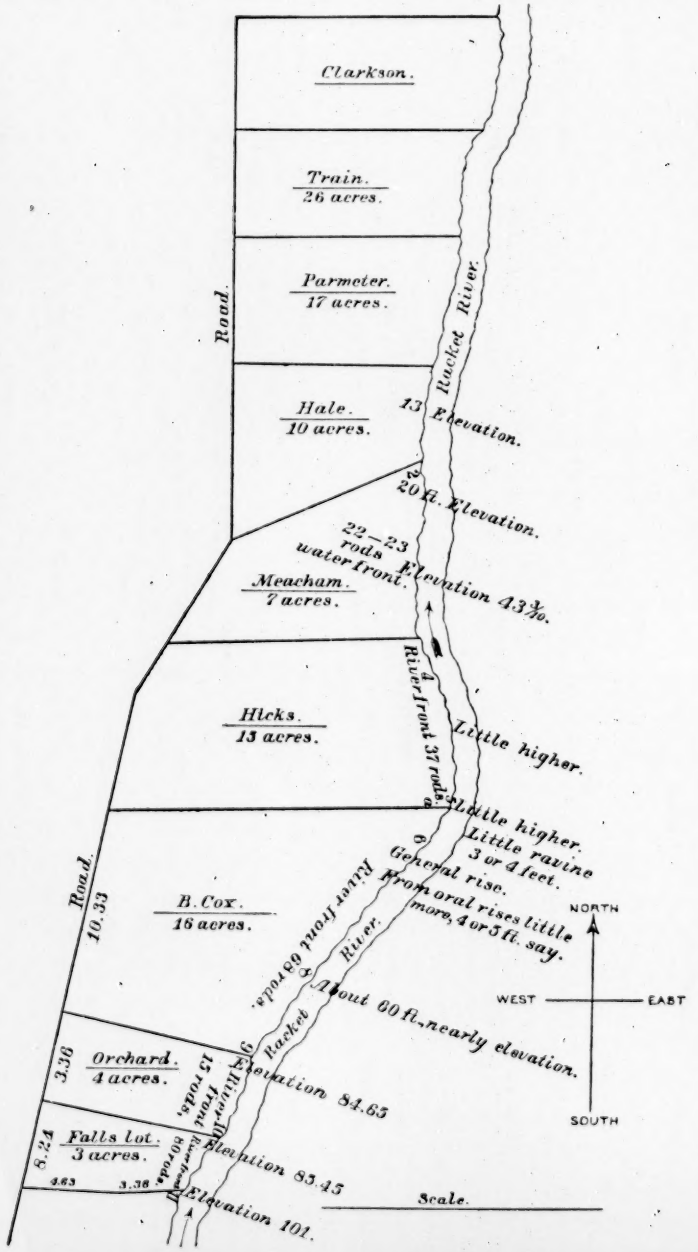
average width here of 8 rods; not deep, because so swift. River extends up over 200 miles from where I made survey. My first station was from 4 to 6 rods north of town line, where Meacham lot commences; did not take level at that point. Rise is small; about 1 foot difference; at no elevation of bank was over $1\frac{23}{100}$ feet. Station No. 2 was 36 rods from where I started. At Station No. 2 the elevation on the bank was $28\frac{15}{100}$ feet. Next station was on Meacham lot, No. 3; it was about 12 rods north of the line of the lot. Elevation there was $43\frac{33}{100}$ feet. Made no other station on Meacham lot. There was no
191 considerable depression at any place on Meacham lot. Station No. 4 was 16 rods south of north line of Hicks lot; did not take elevation. In my opinion it was a little higher than station below. At station No. 5 reduced distances one-half; No. 5 is on the Hicks lot, 3 rods south of north line; did not take elevation; a little higher than 43 feet, a depression of three or four feet. Station No. 6 was about 1 rod south of the north line of the Cox lot; did not take elevation, general rise. Station No. 7 about 8 rods on Cox lot, up river; did not take elevation; a little more rise there, should say about 45 feet. Station No. 8 is about 20 rods from south line of Cox lot. Bank there is about 60 feet. Station No. 9 was in line of Orchard and Cox lot; elevation, at bank was $84\frac{65}{100}$ feet. No. 10 was on line between Orchard and Fall lot; elevation $85\frac{45}{100}$ feet. Station No. 11 was in extreme south line of Falls lot; 101 feet elevation. I took a line on the bank of the river, and went up river; river-front on Meacham lot 22 to 23
192 rods; could not tell precisely as to line. Hicks lot river-front, 32 rods; Cox lot river-front, 68 rods; Orchard lot river-front 15 rods; Falls lot river-front is a fraction short of 30 rods. In river in front of Fall lot could see it was Potsdam sandstone; it was in layers; all the way down had the same indications—same general appearance as that on the bank; the same on Cox, Hicks, Meacham, and Hole lot; same down to and including Clarkson lot; same indications the whole distance; did not examine to see how far back they extended. Parmeter quarry from west shore of river to where work commenced, as far as work would show, from 9 to 10 rods. The derrick is 9 to 10 rods from front; from derrick it is 200 ft. in all that had been opened. I observed breast of rock at Parmeter quarry. I saw stone front on each lot. I thought there was a difference below Parmiter quarry; the front of rock seemed less broken. It seemed like better rock than that on Meacham lot. That exposed to weather was more broken that in
195 the quarry. I did not notice it so as to make comparison between undeveloped part of Parmiter's quarry and any of these lots.

Redirect-examination of witness Parker:

I saw no rock cropping out in river in front of Hole lot. I did not do anything to show that there was solid stone in front of Hole lot.

Recross-examination of witness Parker:

This rock was in layers of varying thicknesses. Map of quarry lots offered and received in evidence, a copy of which is attached and made a part of the case.


Clarkson.
Train.
26 acres.
Parmeter.
17 acres.
Road.
Rocket River.
Hale.
10 acres.
13 Elevation.
20 ft. Elevation.
22—23 rods water front.
Elevation 43 3/10.
Meacham.
7 acres.
Hicks.
13 acres.
River front 37 rods.
Little higher.
Little higher.
Little ravine
3 or 4 feet.
General rise.
From ral rises little more, 4 or 5 ft. say.
Road.
10.33
B. Cox.
16 acres.
River front 63 rods.
Rocket River.
About 60 ft. nearly elevation.
NORTH
WEST
EAST
SOUTH
3.36
Orchard.
4 acres.
15 rods.
River front
Elevation 84.65
6.24
Falls lot.
3 acres.
Elevation 83.45
4.63
3.38
Elevation 101.
Scale.

PETER POST, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I reside at Peirrepont, and am 63 years of age; have lived around there about 52 years. I have dug a good many stone. Commenced about 35 years ago, first in Parmiter's quarry, with him & his father & brothers. I owned the Train lot 20 years; I sold it 16 or 17 years ago. That joins Parmiter quarry. Clarkson's lot is below. Have known Falls lot; was on it 51 years ago. I never saw evidence of any
196 digging having been done except what I did myself. Next lot below is Orchard lot; next Cox lot. Cox lot I worked about 30 years ago. Got out 3 or 400 ft. of flagging-stone; that was done perpendicular. There were iron-seam' in it. I lost a good many stones I dug on account of iron-rust. Above that on Cox's quarry they went to work before I did on this. De Marquis Parmiter worked there about 15 years ago. He took out sandstone; began about 20 feet up; got out a few 2 inch to 2 feet thick; can't tell how long it was worked. Jail stone were got out by Sandford two years before war, 1859; I was not engaged in the work; engaged during summer. Never knew of any other till Gordon came. I was not engaged in the work. Saw the stone from 6 inches to 10 feet long, and some longer. They were getting them out for a mill. I saw the stone when they were cutting them. They used for building what was fit, and threw the ballance in the river. Can't tell how many they got out.
197 I can't answer how much one can do in a day's work in Parmiter quarry. When I worked three of us would get out 6,000 feet in a day. As it is up at Cox lot one man can get out a number of cords good for wall, and some cellar wall. The jail stone were got out there. Some thirty men at work together. I can't tell how many they got out. Some were very nice stone to look at. There were dead seams and iron in it. Some good stone fit for market among them. I never knew of any other work. I don't think there was. In my judgment, in December, 1872, this lot was worth $20 per acre. It is sandy land. I do not consider it any value as a quarry. I knew the Hicks lot; worked on it 20 years ago. Never saw any quarry on it. There were trees on it. Brook has washed out a few flat stone. In December, 1872, it was worth $15 per acre, I think. The Meacham lot might be worth $20 per acre, but would have no value as a quarry. The Orchard lot the way it lies has no value as a quarry; worth $30 to $40 per acre for agricult-
198 ural purposes. The Fall lot, I grubbed out some of the trees on it and uncovered about 1½ rods down to the rock. The stone that I found were broken. It has no value as a quarry. About 4 to 5 acres of it, I should say, were worth $30 to $35 per acre; the balance, about 7 acres, I should think not worth anything. I know the roads from Colton to Potsdam. You can't see any of the ledge from either road.

The witness being cross-examined, testified:

On Meacham a great deal of cord-stone has been drawn away. Flagging-stone secured for that purpose. They stand fire. Have not known what they brought or what it cost to transport them. I am in charge of lots bought by Butler. I have all three. I rent them of him.

Redirect-examination of the witness Post:

Question. What do you give him per year for the use of the lot?

(This question was objected to by the defendants severally as incompetent, immaterial, and irrelevant. The court overruled the ob-

199 jections. To this ruling of the court the defendants, by their respective counsel, severally excepted.)

Answer. Twenty-five dollars. It is the fair value of the use of it.

Recross-examination of the witness Post:

Under lease from Butler. I have no right to quarry. Road could be made along in front of lot. I have answered as to value on the assum'tion that it is not practicable to make a road.

HENRY TRAIN, a witness for the plaintiff, being called and sworn, testified as follows:

I reside in Potsdam and am 50 years old; am stone-mason; have been 30 years. I worked in Parmiter's quarry about 30 year' ago. I have handled and laid a good many stone from the Parmiter quarry. Have been on the Cox lot since; laid many of those stone. I helped lay foundation to greenhouse. 20 years ago laid sandstone foundation for brick house. Don't know of any building in Potsdam from Cox quarry. The most I remember I got there was for the jail. These
200 were got from the outside. Can't tell the proportion of good and poor stone. The top of all quarries, including Parmiter's, are cord stone. All in Canton jail were not got out here. Some were got out on Dimmick's, on line of Cox lot. Large stone for caps and cells in jail were got out on Dimmick's lot. There is no room for yard on Cox lot. Shelly and dead seams. No way to get to it. I have no opinion of it as a quarry lot. I should think there was no value in it as a quarry lot.

The bluff is as high as any place on the river. Would be no value as a quarry; cost too much to get them out. An acquainted with the Falls lot, also Hicks lot. They are not much of a quarry. Meacham lot is poor lot of stone; rough and broken. I have an opinion that in 1872 it was not worth anything as a quarry lot. Land was worth $30 per acre. Know Orchard lot. It crops out better than any other. In the way it lies it has no value; no conveyance to it; cost
201 more than they are worth to get them; worth $30 to $40 per acre. Falls lot I never saw any sign of working in it only as I worked for Gordon. I grubbed out some trees here for 40 or 50 feet, about 1½ rods wide. Came then to rough edge of quarry; they were broken sandstone. I have an opinion as to its value as a quarry. I consider it of no value; land worth $35 per acre. There are 7 acres in the lot. I know all the land in the lot. I know the road from Colton to Potsdam on both sides of the river; travelling on the road; there is one place where one can see the stone.

Cross-examination of the witness Train:

I have quarried and got out some. I owned Train lot. I got out 40 cords of stone there that went into Duff's tannery at Potsdam. I got $4 per cord. I hauled them in the winter; most of cord-stone got on ice. Got other stone on the Train lot. Sold some flagging-stone to Parmiter; I farmed on the same lot. At that time these were not fit for flagging—mere cord-stone. Drew flagging to Ogdensburg 30 years ago, at 6
202 cents per foot. I did not continue to work for stone on the lot. I took places where I could get at them the easiest. I never saw new jail. I saw the stone taken by; they were fair samples of stone from top of quarry. Saw mill on east side of river; there is a ledge where mill is built; they were sandstone; some were got on edge of river. A starch factory was built there. Stone were got out where mill stands, enough to build the whole building; this was 40 years

ago. The building was extended perhaps 25 years ago. So far as I know, all the stone were got there. Have not bought or sold any stone within 28 years. The Parmiter quarry may have been worked for fifty years; has been worked a good deal. The Parmiter lot is the only one I value; have worked in Parmeter quarry. The stone on surface are the poorest; as you go in they improve. I worked there two or three years ago a month or two. I teamed and drew stone to Potsdam and Ogdensburg. Have laid these stone in Pierrepont; they were from Parmiter quarry. Some were good; some were not; all
203 were durable. I know of a better quality of stone of the Potsdam sandstone than those in the jail. They are in the new school-house. I quarried a few stone in the Hicks quarry in 1843 and 4; only got a few; could not get them as cheap as I could buy of Parmiter. Worked on Parmiter quarry a few days. I have been familiar with what it cost to raise out of quarry and carry to Potsdam. The Normal is 250 by 130 feet; style broken ashlar. Presbyterian church and town hall are built of Potsdam sandstone. The water-table, philasters, &c., on the Elderkin block are as good stone as I ever saw. There is a road up along the Meacham quarry, only a portion of the way across the Meacham lot. I have not a doubt in my mind but that there are good stone in all those quarries. I think the Parmiter quarry is king. There are places on Parmiter lot where it does not show good. Different qualities are taken out of the Parmiter quarry. I think it is not practicable to build a road along the upper quarries. I have no doubt there are good stone there; that a road cannot be built,
204 and that there is no place for refuse enters into my opinion of their value. I don't know as there is any market for refuse stone.

Redirect examination:

Witness said: If there was a road built to the Cox quarry and a place found for refuse stone, should think the quarry worth nothing as a quarry unless there was a market for cord-stone.

HUGH YOUNG, a witness called for the plaintiff, being sworn, testified:

I live in New York City; I had a stone-yard there from 1855 until last year; I was in Potsdam in 1871. I had previously ordered some stone there; called to see them. I was taken to the Parmiter quarry by Gordon, and thence on the east side of the river; also was taken above the Parmiter quarry on the same side. Parmiter quarry is up where there is a high bluff; the stone seemed very well. We went down on the back of the river, but it was impossible to tell the quality of the stone. As we were there Gordon asked me what the value of that deposit was, and whether or not he had better go
205 to quarrying it. I had seen the stone only by sample, and in arch-stone and band-course, and had recommended it on 70th st. My business was to see the stone at the depot. I saw them there and was disappointed, and I went to Gordon and told him they would not answer. I found deposits of iron rust, and marked changes of color, and places of green sand disfiguring them. I told Gordon I would answer his question after viewing the quarry. After impressing upon them the importance of care, I went and saw the places before mentioned, and on my way back gave Gordon my answer. I told him that I felt I must withdraw my recommendation of the stone. I told him I thought the stone would not answer for city work; that it could be used

for architectu'al effect when vari'ty was wanted, and it might do to carry to places where rough work would answer the purpose; that he had better stick to his law business, although a man might get a living by getting out these stone. About two-thirds of the stone at the depot I rejected.

Cross-examination of the witness Hugh Young:

206 Was there in summer of 1871. I gave him a certificate. (Paper shown witness, who says:) This is the certificate. (Paper offered by defendants and received in evidence, and is as follows:)

OFFICE OF THE HUGH AND JAMES L. YOUNG
STONE-CUTTING CO.,
Foot of East 117 St., New York, January 20th, 1873.

S. B. GORDON, Esq.:

DEAR SIR: Your Potsdam stone has been used by us on several jobs for arch-stones, band-courses, &c. The color is warm, and has proved to be very effective and su't*i*ble for combination with other rocks commonly in use, such as Amherst, Ohio, Belleville, N. J., green serpentine, &c. It is, we suppose, a vitrified sandstone, and appears to be all but indestructible by weather. For combination of color in city structure, and in the country, for churches, schools, public buildings, or dwellings, we think it a very desirable stone, and have no doubt it will take a prominent position among building materials.

Yours, truly,

HUGH YOUNG, *Pres't.*

207 I have visited quarries; I have no knowledge that there is a class of stone called Potsdam sandstone except what I get at Potsdam. I only went to one quarry. Parmiter was working in it. Some men were cutting in under shed. One objection was the spot in the stone, and that it was marked in sudden changes of color; there were streaks across; have seen them used in broken ashlar, quite a few. I don't know whether the spots disappear or not. They do not, to my knowledge.

ANDREW J. TRAIN, a witness for plaintiff, being called and sworn, testified as follows:

Have been a mason for 30 years; am contractor and builder; for many years have been acquainted with Potsdam sandstone, and have used it. Last summer I used it in the Universalist church; used it in town hall also, in Potsdam. I was contractor for these buildings. The stone came from Parmeter quarry. It is a beddish sandstone in the quarry, and is of all thicknesses from one to two feet thick, and of all colors from light to dark, all in same slab, sometimes very often so; could not make it all of uniform color;
208 other specimens of sandstone might differ in color, weight, and size from the specimen here in court; the lines in the stone run different ways; would call the stone from the Parmeter quarry a third-rate building-stone. In the Parmeter quarry the principal objection is that iron is found in the stone in small lumps; this would ooze through the pores in the stone and stain it. I know something of the stone in the Ben Cox lot. It appears here in a different form. I was there when Sandford was getting stone for the jail. The stone was shattered and broken, and the cross-sections were nearer together than in the other quarries; can't get out as large a stone as you can below. In the

Parmiter quarry all the stone in the same layer are of one thickness. In the Cox quarry this is not so much so; the layers are more inclined to bedding, and more labor is required to prepare the stone for nice work. This is the same in the Cox quarry; there are so many wide land-cavities and iron as to unfit it for market. I have been in Cox quarry; was Friday or Saturday before I came down here, the
209 last time I discovered these characteristics. I have formed an opinion upon it as a stone quarry; don't place any value upon it. It has no value for quarry purposes. I made an examination below the surface as to those stones not quarried out. The lower down I went the more iron I found. The iron shows itself on the face of the stone. I know of no building made of this stone. I know the Orchard lot; don't know of any stone having been got out of it. It is a high bluff of stone opposite Falls, and about perpendicular.

The water in the river opposite is swift; judging from the stone I saw it is of no value; should say as to Falls lot, Hicks, and Meacham, not so many stone in these quarries appear; some had been quarried; should not put any value upon these lots as quarry lots; they are valuable only as farming lots.

The witness Andrew J. Train on his cross-examination by defendants testified as follows:

The greater part of my stone work has been of Postdam sandstone. Have been a mason 30 years; stone-mason five years. I never knew of any wall of this stone failing; stone in quarry bed is durable.
210 I know the Episcopal church in Potsdam village. I know the Clarkson quarry; it is next below the Train lot; it is a clear, handsome wall; there has been no change to my knowledge in 30 years. I know the Raymond block; it does not present a fresh appearance; it is not as bright as church; it looks like the stone dug in Cox quarry; the water-table is of good quality of stone. I have noticed the water-table and the colum's in Elderkin block; they compare with the top layers of Cox quarry; in a measure they are good stone; they show no appearance of rust. Know the house of Usher on Elm street; the house has been there as long as I can remember; it shows no appearance of decay. I know the Judge Allen house in Potsdam. I have not seen any decay or iron rust in that. I know the basement of the Methodist church in Potsdam; it resembles a portion of Parmiter quarry; there is more or less iron-rust on the basement; the Normal School build ing, in Potsdam was built of the Parmiter stone; the material
211 appears good in the school building except for iron-rust. I noticed several places on the walls of iron-rust; can't tell how many places; never examined to see how many spots presented that appearance. The Normal School was built in 1868. The iron rusts out and ex'austs itself. I never worked in a quarry. At Cox quarry they have gone down ten feet; in no work place have they worked as far as in the Parmiter quarry. I don't consider the Cox stone as fine as any that has been taken out. There is a great waste of stone there. I have seen sheets taken out of Parmiter quarry 3 inches thick, 15 feet long, and 8 feet wide. I have known of their being sent all over the country; they are good, fair stone; they stand fire well. Mr. Hunt is the principal quarryman. I judge of the value of quarries from the appearance of the stone, and the convenience of getting them out. To all *all* appearance there is abundance of stone on all lots; the stone appear best to me when dressed down; can make decently straight breaks in them. The stone are broken easiest by checking when not more

than 6 inches in thickness; when of greater thickness they are broken by the use of the drill. Holes are drilled one to two feet apart for this purpose. Stone are dressed now by smoothing the edges, leaving the center rough. I judge of the Meacham lot by considering the quality of the stone and the inconvenience of getting them out. A road could be built in front of the quarry. I don't know how it would do to put a road over the quarry to the river. My opinion of the Hicks and Cox lots is based on the quality of the stone, and the inconvenience of getting them; in my opinion the Cox lot is good for nothing. I don't base my opinion as to the Orchard and Falls lot on the ground that the stone are worthless. I have not examined these lots sufficiently to form an opinion as to their value and value of the stone. Assuming that it was practical to make road, my opinion as to the value of the quarries would not be changed.

Redirect examination of the witness by plaintiff:

The Potsdam sandstone is a hard stone to cut. It is hard on tools. I don't know of any building or wall of dressed stone. Drill-holes must be dressed out in front.

WILLIAM MATHEWS, called as a witness by plaintiff, being duly sworn, testified as follows:

I live in Potsdam; have lived there over 50 years. At the building of the town hall I was town commissioner. I am a contractor and stone-mason. I have tried to make sale of the Potsdam sandstone away from Potsdam. Tried to make sale in the spring of 1874 in Boston. I have been at the Parmeter quarry. I never worked in it to speak of. I think the town hall was built in 1874. I have made casual examinations of these quarries. Swift and I went up to get some stone for ourselves. I know what I understand to be the Cox lot. I was alone at that point. I did not think it would be profitable for us to develope any for what we wanted. The condition of the quarry was such that I could judge. I noticed stone that might be worked into ashlar. I had an opinion concerning the stone, viz, that I would not want to put much capital into it. I am not acquainted with the cost of quarrying. I should think it might be a sort of speculation which might develope well, and might not. I know the Parmeter quarry; in the same stone there are different; colors the balance of stone might and might not correspond; different strata are of the same color. It would be difficult to fill large contracts when fine uniformity of color was required. I have discovered some sand holes and some iron. Sometimes when a stone is partly broken the crack passes across, and sometimes nearly, and not in sight, and makes its appearance afterwards. The iron stains the face of the wall, sometimes within a month and sometimes sooner. I have known the stone to part when it was supposed to be solid, when put down. There is abuttresses on the bank steps that parted of its own accord. Did not notice stone on Hicks and Meacham lot. You can't see the quarries when passing on the road, but could see if you were looking for ledge.

Cross-examination of the witness Matthews by defendants:

You can see the derrick in Parmiter's quarry from the road. There were some buildings built of this stone in Potsdam before I can remember. The house of Usher is one. In this house no decay or disintergration is visable, or iron rust, but the face of the wall has an oldish appearance; the same may be said of the Judge Allen house, which is not more than 8 feet from the walk. I have noticed the steps of the

house above the Judge Allen house; they show no decay; they lay as they did in the quarry. I know the Raymond block and the Bonney store. They show no iron-rust or moss. The stone has the same fresh appearance as granite. It has a fresher appearance than blue limestone. I consider the Potsdam sandstone a durable material. I don't know of any more durable material. As you stand before a building of this stone the difference in colors effects it to its disadvantage.
216 Normal School building, for example, is stained, in my belief. In passing it an ordinary observer would not notice it. I know the extent of the opening at the Parmiter quarry. It is less than 350 feet up and down the river. It is carried down to 3 or 4 feet above the water. In one place it is below the level of the water. I know the undeveloped part of the Parmiter quarry; can get at that easier than at the Ben Cox quarry. There is no doubt about there being a quantity of stone in these quarries. I do not know where any of the stone in any of these old houses came from.

ALPHEUS EMERY, being called as a witness, testified for the plaintiff and duly sworn, testified as follows:

I reside at Potsdam. I worked at Ben Cox quarry in 1859. I got out stone for Canton jail; six, eight, or ten men were engaged at it. Can't tell how long they were engaged. I worked on the bank, breaking up stone. Did not help raise. I can't tell what proportion were not
217 used perhaps one-half. I did not get them all at Cox lot. Tried to get a stone for one door-sill; we tried a good many for one door-sill; they were too small and had seams; I mean a dead seam which opens them. I have an opinion as to the Cox lot as a quarry lot. Should not think it was of much if of any value. I have only known as to Cox lot; not as to Meacham, Falls, or Hicks lot.

Cross-examination of the witness Alpheus Emery:

Is supposed the stone used in the jail were of good quality; I have not noticed them since. I do not recollect as to the size of the stone used in the jail. There were flagging for cell bottoms and stone for walls. Got the flagging in the quarry above. We saved all the stone that would fill contract. The door-sill was quite a large stone. Have laid Potsdam sandstone some. The stone is supposed to be good for durability for building purposes. I think there is an abundance of the stone there. We got the cell stone about ¼ of a mile above; the
218 same kind of stone as from Cox quarry as to sandstone.

CHARLES EASTMAN, called as a witness for the plaintiff, being duly sworn, testified as follows:

I am 66 years of age; have resided in Stockholm and in Potsdam, and live near quarries; have worked in stone business; commenced when I was 6 years of age; been engaged on it the last ten years; I worked at the Parmeter quarry myself about five years; I have noticed the iron-rust spots in the stone; I worked on the Meacham lot 22 or 23 years ago; I quarried about 60 cords of stone there for S. B. Gordon, & piled them up. Some of these stones were there five or six years ago. I should call them poor stone, cord-stone, fit for cellar walls and fences, worth a dollar a cord at the quarry; they were worth $3 a cord at Pottsdam village; I never saw any other kind of stone there. The stone on Hicks lot are poor stone. I was at the Benj. Cox quarry when Sanford was getting out stone for the Canton jail. I saw spots there that appeared to have been crushed. I noticed iron spots in the stone; did not see any sand-holes. About a week after that time I was

219 there again. I saw ashlar there that was cut out. I saw stones that were soft in spots; have seen holes in the stones on the sides that appeared that were eaten out. When they hammered or broke the stone I saw seams in them; the walls of the edge looked flaky. I saw stones there that looked as though cut and not fit for use; have not noticed the quarries since; I do not think it would pay to quarry on Cox lot, on account of defects in the stone and the difficulty of getting rid of the refuse. The current in the river is swift, and makes towards that shore. The main current is along the Orchard lot. The bank there is sharp and steep; never examined the stone there; have seen them as I walked along, but did not see any market stone. I do not think it would pay to quarry in Orchard lot or in Falls lot. I have noticed the stone in the basement of the Methodist church.

Cross-examination of the witness Charles Eastman by the defendants:

220 This basement is about 60 by 100 feet and 12 feet high; the stone used was got out of Clarkson and Parmeter quarry. Potsdam sandstone is durable, good for flagging; never knew of a stone failing. I did not know the price of cut-stone flagging in Potsdam. You can't see the front of the layers; there is a breast of stone in front. Potsdam sandstone is the hardest kind of stone to cut I ever saw. I worked the Parmiter quarry from 1859, five years. I held it under a Boston company. I think I saw a very little rust in the Parmeter quarry. I never saw the stone quarried for the jail after they were laid. You get more poor stone when you first open the quarry. The earth and poor shelly stone have first to be removed.

HENRY EMERY, a witness for plaintiff, being called and sworn, testified as follows:

I reside in Potsdam and have resided there for four years. I know the quarries. I work a small farm when not in the quarry; have
221 worked more or less for forty years in the quarries. My father owned the Meacham lot; he got out some cord-stone there and took them to the village; they were heavy broken stone and were not of good color. They were good for farm walls. I would not consider the Meacham lot worth anything as a quarry, other better ones being so near. I never worked on the Hicks lot. As far as I have seen, it is not good for a quarry. I worked on the Cox lot in 1872 under Parmeter; we were in pursuit of a stone for a paper-mill; we got one, but it proved bad. We got some cord-stone there. I did not think it would pay to get out such stone, so far as I saw. There is plenty of rough-looking stone on the Orchard lot. Should not think it worth anything for a quarry. I know the Falls lot, but never worked on it. I should not think it of any value as a quarry lot. I never worked on the
222 Cox lot, except as I have mentioned. I went to where they were digging there; did not hear conversation in presence of Gordon. I was in the habit of carrying men to town. Some one said, "How are you getting along in the Cox quarry?" Some one else said they did not think it would prove good. Watkins said he was afraid it was not worth a cent. This was in July, 1873. They worked a spell afterwards, a few days, perhaps a week. There is a break—a strain—about half way between Meacham and Parmeter quarry. Am now at work for Potsdam Sandstone Company.

Cross-examination of the witness Henry Emery by the defendants:

I commenced to work in opening the Parmeter quarry. It had been

worked some. I helped uncap it. There are sound, solid stone, but more broken up; as fast as we go down we find much better stone; as better as building-stone. Can use all we get for cord-stone. The first stone that were found in Parmeter quarry were not fit to dress. Sometimes two or three in ten would be good.
223 We get flagging-stone there 2, 3, and 5 inches thick, 10 feet square. They have one plane surface. Sometimes they give us trouble in getting them out; sometimes not. In different places it is different. They have got ashlar out of the Parmeter quarry only since 1867. They have found building and flag stones there ever since I remember. I know of their getting stone in the Cox quarry. There are enough stone there, such as they are. It has been developed to any such extent as the Parmiter quarry. They are both broken up and in layers; and being broken up it makes it much cheaper to get them. We were looking in Cox quarry for a stone in a circle of five feet. We worked at one and found it to be poor. I know they continued to work there. It was in 1873 that Watkins made the remark that I spoke of; before the last of July, I know, because some of my boarders went home in Canada. It was on Saturday, just at evening. John Cowen was there. He was the only overseer in the quarry. I
224 think he must have heard the conversation. He lives at Cowensville, Canada. Other men were there. I can't name any other person; I can't name any person who participated in the conversation. Some asked how they were getting along in the Pierrepont quarry. I said I did not think they would make anything. Watkins said, "I don't believe that quarry is worth a cent." I don't know anything else that was said. I thought he made the remark because he was not having good luck. I do not think he meant it was not worth a cent. I can't tell how many days they had worked. I can't tell whether it was before or after the 4th day of July. I think it was after.

Redirect examination of the witness Henry Emery:

I thought by what he said he thought they were not having very good luck there.

RICHARD DOWNEY, a witness called for the plaintiff, being duly sworn, testified as follows:

I live in Potsdam, and have for 24 years. For last 10 years
225 have been engaged in sandstone business, in quarrying. I worked on the Cox lot in 1872 in getting stone started. We were after some to send to New *New* York for building purposes, to send to Young. I think we got out a few stone there. They were poor, irregular, rough, and had iron spots. We took them down to Parmeter's to be worked. I saw Young reject them himself. A part of them rejected were from the Cox quarry. In 1873 I worked for the Potsdam Sandstone Company 8 or 10 days. We found no stone that was fit for the foreign market. They were of poor quality and had more or less iron in them, and were badly broken up. Hunt was there, and had us drill the stone up into strips. He was superintendent. In 1873 a small quantity was got out. From 12 to 18 men were at work on that quarry at that time. Gordon was there during this time, and Watkins was there looking it over. In presence of each the report of the day was made as unfavorable. The further we sunk
226 that pit the poorer it seemed to be. I took up some of the stone. It was broken into all shapes and dimentions. As a quarry it was not worth a dollar. I know the Hicks lot. I have observed the

stone and ledge. It has no value as a quarry. I looked at the layers of the stone. They are of all sizes and of different colors. I made up my mind it was worthless. Know the Meacham lot. It has no value as a quarry. The Orchard lot is not developed any. Gordon requested me to bring him samples of the different quarries, so as to make a map of it, so that he could show specimens from the quarries. I crawled around and took away specimens. They were so irregular in shape and different in color that everything was unfavorable, and I thought I would not bother with it. I made up my mind they were worth nothing. This was in July, 1872. I told him what I have stated here as in regard to it. I worked in the Cox lot with
227 Morgan in March, the last year. I went and looked the stone over. Many of them failed on our hands. One-half failed in some way by reason of cross-seams, or iron, or something else.

Cross-examination of the witness Richard Downey:

I never worked in other quarry in getting out building-stone. I commenced at work for Parmeter in 1865, '6, or '7, in Sandford quarry, on east side of the river. This was opposite Clarkson and Train lot; was at work for him some five or six years on the west side, down to the time sandstone company was formed; that was in 1873. I worked for that company that fall; did not work in 1874; was discharged. In 1871 I worked on the B. Cox quarry. They did not open in 1871 to any extent or at all. They did in 1872; in May, I think. Parmiter and a Frenchman named Mose Akins were with me. We woodchucked around; hunted for stone; we went three or four feet deep in
228 some places, in others as high as our heads; made excavations some 50 feet long and 15 or 20 feet wide; this was in 1872. Next year worked for company when they opened; we made opening there about 140 feet long and 20 wide, 12 to 15 deep. John Cowen had charge. Hunt was superintendent; he was there once a day. I worked there off and on a week or ten days. I was there when they left off work; they commenced in June, 1873, and left off in July. There are lots of stone in all of those lots. I did not know the price of any kind of stone in 1872.

Redirect examination of witness Richard Downey:

I worked for Parmeter in Hammond, in the spring of 1874. I also worked for Emery in the same spring, uncapping in the quarry 30 or 40 days.

TRUMAN JONES, a witness called in behalf of the plaintiff, being duly sworn, testified as follows:

229 I live in Potsdam. I know Gordon and Mr. Watkins; in 1872 I was frequently in Gordon's office. I frequently saw Watkins there. In 1872 I heard conversation between Gordon and Watkins; they were talking about sandstone; once in a while I met Watkins there; they talked about sandstone. November, 1872, I was solicited to take stock. Gordon says, "Why don't you go in with us?" Watkins said, "You had better go in; I am going in. We will make some money on it." At a time when Watkins was not present I heard Gordon speak of expecting some money of Butler, and at another time I heard him say something about letting Watkins and Foster have some money; neither of them were present.

(The plaintiff here identified Gordon's signature to three certain checks, with endorsements thereon, and offered the same in evidence. They read as follows:

[U. S. rev. stamp 2 c't.]

No. 94.] POTSDAM, N. Y., *Feb.* 4, 1873.

The National Bank of Pottsdam pay to E. W. Foster, or order,
230 five hundred dollars.
$500.] S. B. GORDON.

(Endorsed:) E. W. FOSTER.

K. No. 12.] POTSDAM, N. Y., *Feb.* 8, 1873.

S. N. The St. Nicholas National Bank of New York

A. A. [U. S. rev. stamp, 2 c'ts, overwritten.]

L. B. pay to the order of Henry Watkins
O. fifteen hundred dollars.
H. L. $1,500] S. B. GORDON.

C. A. (Endorsed:)
Q. N. Pay to the order of E. N. Foster.
N. O. HENRY WATKINS.

1. Pay to the order of C. R. Knowles.
T. T. E. W. FOSTER.

S. A. C. R. KNOWLES.

N. Pay J. A. Beardsley, esq., cashier, or order, for collection, for account Albany County Bank.

JNO. TEMPLETON, *Cash'r.*

[U. S. rev. stamp 2 c'ts.]

No. 100.] The National Bank of Potsdam pay to E. W. Foster or H. Watkins, or order, twenty-five hundred dollars.
231 $2,500.]

S. B. GORDON.

(Endorsed:)

E. W. FOSTER.

The said defendants, by their said counsel, severally duly objected, on the ground that there was no evidence of conspiracy proven, and that the evidence offered was incompetent, immaterial, and irrelevant.

The court sustained the objection of the defendants, and ruled that there was not sufficient evidence at that stage of the case to justify the admission of the checks.)

The witness further testified: The conversations I had with Gordon were with him alone. In the first, from the 15th to the 20th of January, 1873, he said he expected some money of Butler, and would let me have some—about a thousand dollars—the last of January. He told me he couldn't let me have it; he had got to let Watkins and Foster have some.

232 The witness, on being cross-examined, testified as follows:

When Watkins spoke to me about the sandstone business he was laughing as he said it.

R. C. GREEN, being sworn as a witness for the plaintiff, testified as follows:

I know Henry Watkins. The last of June or fore part of July, 1873,

at a time they were working the Ben. Cox quarry, I heard him say that he was going to see if there was not more than one hole where they could get good stone out of that quarry.

EDWARD HITCHINGS, being duly sworn as a witness for the plaintiff, testified as follows:

I live in Potsdam; been engaged in lumbering and milling business. In 1872 I had a talk with Gordon and some others about organizing a sandstone company, on a trade to be made for Parmeter, Meacham, Hicks, Orchard, Falls, Cox lot, and one on the other side. We talked of $25,000 for five of the lots, the Parmeter and Train being put in at $12,000. Watkins talked of going in. Watkins said he didn't think upper lots of much account to the company, but was willing to have them put in at moderate price, $2,000 to $3,000, to control production on river. There were five included in remark of upper lots, all above Parmiter; was concerned with Parmiter, working Parmeter ledge; should place no value on them as quarry lots.

233 Cross-examination:

In papers lots were valued—don't remember all—the Falls lot, $2,500; the Parmeter, Hicks, and Train put together at $12,000; one lot on east side put at about $1,500; think he said didn't want quarry beside Parmeter quarry but to control business. I am acquainted with the five quarry lots mortgaged to plaintiff, and, in my opinion, they are of no value as quarries.

CHARLES HICKCOCK, being called as a witness for the plaintiff and duly sworn, testified as follows:

I reside in New Hampshire; am a geologist in Dartmouth College; am State geologist of New Hampshire; have made the science of geology a study for many years; have been a teacher in Dartmouth eight years; have examined the quarries and mines east of the Mississippi, in the northern part of Tennessee, and in the Old World. I have visited the ledges in question; was there the last day in May this year; I
234 began at the Parmeter lot, and went through the others; I spent half a day from Parmeter lot up and back; my object was to determine the value of the quarries; I found at the Parmeter quarry an opening near the river, from which stone had been taken. The pitch up the river varied 25 degrees sometimes; west of south is the pitch; the course would carry it back of those quarries, and would carry it several feet lower; the bank is on low ground; no ledge there; there was a brook in the low ground between the Parmeter quarry and quarry lot above, and I concluded there was a break between Parmeter quarry and those lots at the brook; bank at the Meacham lot is twenty feet high; here the stone cropped out; pitch of the stone is 22 degrees; they are of lighter color; it is common rock; don't remember of its being in small pieces; as a whole it is broken from the other quarry; I saw none of any commercial value;
235 at Hicks lot the bank is higher; appearance the dip is more to the west; the dip is different and the color is diferent. It is lighter than the Parmeter quarry; break is the same; saw no large stones on Hicks' lot. It is a common ledge; would answer for walls and roads, and for rough building purposes. Saw the opening in the Cox lot; I examined them most carefully of any. The other rock had been removed for quite a distance, some 80 feet. Went down there at different times, where road started to go down there, 25

years ago. Stone is red and broken. This was on upper end, coming down on road. I saw where rocks had been taken out recently; iron appeared, which made the stone of little value. Bedding was not as it should be; there were fractures. Large stones could not be got. Some stone was stained with carbonate of lime. Stone was wedge-shaped, so that their value is impaired. Iron eats and stains the stone. Dip here was west of south. At north end of lot you can see the end of the ledge pitched up. Think there can be no good stone under
236 the river. For quarries—it would not be a good quarry to work. I don't think it would pay to work; rock is the same throughout the whole extent. If you were to go down 150 feet you would reach bastard granite. It would be apt to be the same rock above as under the river. In the Orchard lot the stone is the same as in the Cox lot, no opening on it. I cannot say what there is under the soil. As far as I could see it was ordinary sandstone. I should judge it was broken red sandstone. Could see no stone of commercial value on the Falls lot; the ledge is concealed; but the rock is the same as on the Meacham and Hicks lot. The rock is of no particular value. Once in a while a stone suitable for building might be found. The ledge is not suitable to be quarried on a large scale. There are two breaks here, one between Hicks and Cox lot and one between Orchard and Falls lot. I judge from the position of the strata stone is not plastic, but when pressed will break. Dip on Parmeter is west by south; on
237 Meacham lot di*d* is toward Parmeter; on Cox lot the dip is west of south; on Meacham and Hicks nearly flat. Breaks are occasioned by forces in the earth acting on larger scale than "ice;" strictly from side, not under; it would break entirely through to the granite.

The witness Charles Hitchcock being cross-examined testified as follows:

The original stratification of the Potsdam sandstone was nearly horizontal, dipping north. After formation came an upheaval, which would break the strata, so that the inclination might be in every direction. I noticed breaks nearly perpendicular. I commenced at the Parmeter quarry. There are two changes of dip there. There are three different positions of the stone as they lie in the quarry. No dips of any consequence to the north. The east part of the quarry, where the principal working has been, is inclined about 25 degrees to the south. Farther west the ridge slopes 20 degrees to the west. Last dip is 8
238 or 10 degrees, the corner up the river nearly south. I made no examination of Train lot. On crossing the Train lot I came to the brook and flat, 80 to 100 feet wide. There was a bank on each side. Stone appeared at about the same height on each side of the brook. I did not examine more than 100 f't from the river. I did not make excavation; did not make an examination in the bed of the river. There was no appearance of any solid stone. I did look with reference to ascertaining if there were any stone in the river. The stone on each lot are of the same period; that is, the sandstone period; formed at the same geological period. The Potsdam sandstone is formed by means of the cementing qualities of silica. The red color is due to iron; the red color is deeper at Cox quarry than at the others. I did not notice the place near the opening of the Parmeter quarry. There are good stone in the Parmeter quarry. The stone in the Parmeter lies from 1 inch to 2 or 3 feet in thickness at the bank of the river. It is easy to get out, and easy to fracture. Never had any knowledge
239 of the stone as a workman, superintendent of workmen, or sales-

man. You cannot reason from breaks as to what a quarry may be. On Orchard lot I got on the bank and looked down; that was all the examination I made there. When iron rust appears on part exposed it continues clear through the strata. I have had no experience in Potsdam sandstone. I presume I know some fifty quarries—marble, granite, and sandstone. My opinion of value is in part based upon the fact that when iron appears it continues through the strata. Iron might exist in 100 f't and not in the remainder, but not in 200 feet and not in the remainder. Some stone can be got out of all the lots as out of Parmeter; could on Cox lot; can't say as to others; I think not on Meacham lot. The others were opened sufficiently for me to form a judgment for practical purposes; there is one break between Cox and Hicks. The middle of Hicks is nearly horizontal; the middle of
240 Cox dips to the southwest. This was all along wherever exposed. There was depression of surface over this dip. There is another dip between Orchard and Falls lot. The Orchard lot dips southwest nearly twenty degrees. The Falls lot is nearly horizontal. These seams are not breaks; joints are formed after the strata are formed; according to one theory, by pressure from the sides. On the Cox lot the stones have been crushed by ice. The bank of the Falls lot is 5 feet high.

Redirect examination of the witness Charles Hitchcock:

Where the brook comes in would be 100 feet lower than the surface of the upper layer in Falls quarry.

WILLIAM H. BREWER, a witness called by the plaintiff, being duly sworn, testified as follows:

I reside at New Haven; am a professor in Yale College; have made geology a study 28 years; I spent two years in Europe as a student. I was in Pennsylvania and California some years, then I
241 went to the Rocky Mountains. I made an examination of these quarries on the 6th and 7th of July, 1875. Also visited the Parmeter quarry. I went up to the old hill, then I came back; the next day I went from the Parmeter to the Cox, not going a mile. In the Parmeter quarry the dip is southwest, on an advance of 20 degrees. The bed of the rock is even; the stone here could be taken up in large sheets. It differs slightly as to color. Stone are of large size. Pieces 20 feet long and 6 or 8 feet wide can be taken out. The quarry is 15 feet below the surface of the river; they had opened a new part. I made an examination of the new part; found scratches on top of stone. Above there was a change of strata and dip; it struck me as a valuable and desirable quarry; thought it a desirable piece of property. I saw no indication of stone on opposite side of river. The Meacham lot is not so regular, more nearly level, dipping slightly to the northwest. Make no distinction between
242 Hicks and Meacham lot. They are a good deal alike. I did not think enough work had been done to call them quarries. On Cox lot the dip is up the river 20 degrees. The rock is not so evenly bed'ed here. A block of five or six feet long would not be of same thickness. Surface would not be so smooth. Some 100 cords were got out, and on the surface rock was very durable, hard, and firm, but irregularly broken. Saw no evidence of quarrying on the Orchard lot. I noticed exposure of rock on opposite side. I should say they were Meacham, Hicks, Cox, Orchard, and Falls lots have no value for quarrying purposes, and would not pay to work; they are only available

for cord-stone. Cord-stone is so abundant as to be of no value; the examination of these quarries by me as a geologist convinces me that these breakings extend to an unknown depth, probably to the bottom.

The river in front of the valley has mud and these stones in it.

243 Cross-examination of the witness Brewer:

I did not examine up the valley. The sandstone of Parmeter quarry is very durable and valuable and easily worked into shape. I have seen it in public buildings. I fancy that the quarry is three miles from the railroad at Potsdam. I did not know the price of any kind of stone except as I heard it. It looked to me that the Parmeter quarry would supply all the stone that would be required, and was much more accessable. These considerations entered into my opinion of value. The dip in Parmeter quarry is 21 or 22 degrees southeast of where the depression is in the quarry, 35 to 37 degrees southwest where they had recently uncovered. I would not change my opinion materially as to the upper quarry if the top of the Parmeter quarry was the same as the other; I would have said it was not a good quarry. Sandstone varies as to depth; the originally formation was substantially
244 horizontal; after formed it was hardened; this condition was produced by force from below. The sandstone are all of one period. The color depends upon the quantity of iron in it. Silex with other materials makes a strong cement. All these stone would make a good fire-stone.

The plaintiff here rested his case.

And thereupon the said defendants, Foster and Watkins, by their counsel, severally requested the court to rule that the plaintiff had not made out a case against them, and also severally requested the court to direct the jury to find for the said defendant on the grounds severally below stated, to wit:

First. That the conspiracy alleged in the declaration was not proven against them.

Second. That the plaintiff could only recover upon a combination of the defendants set forth in the declaration, and that the same had not been proven.

Third. That the plaintiff has failed to prove a conspiracy or
245 combination to cheat and defraud, as alleged in the declaration.

Fourth. That the proof is not inconsistent according to natural and probable circumstances and inferences with innocence and good faith on the part of the defendants.

Fifth. That the inferences from the testimony does not show anything beyond a suspicion of bad faith, and do not amount to proof.

Sixth. That it is not proven that said defendants knew or had reason to believe the statements in their certificates to be false.

Seventh. That a scienter must exist on the part of the said defendants to justify a recovery and cannot be presumed. It must be proven.

Eighth. That fraud cannot be predicated upon a simple statement of judgment as to value.

Ninth. That the evidence does not justify a finding of the falsity of any statement beyond that of value, and a recovery cannot be had even if the statement of value be found to be false.

Tenth. That the evidence does not show that the defendants
246 knew their statement as to value to be false.

Eleventh. That the evidence fails to show that the said defendants intended to deceive or defraud the plaintiff.

Twelfth. That the fair inferences from the evidence show that the plaintiff did not rely upon the certificate of appraisal.

Thirteenth. That upon the whole proof a cause of action has not been established against the said defendants.

And the said motion was made, as to each of said defendants, upon each of the grounds above stated, and was overruled and denied by the court, as to each of said defendants, each of the grounds above stated; to each of which rulings the said defendants, and each of them, duly excepted.

The said defendants, to support the issues on their part, called as a witness BENJAMIN F. SHERMAN, who, being duly sworn, testified as follows:

I am physician and surgeon, and reside in Ogdensburg. I lived
247 at Potsdam from 1842 to 1845. I knew the Potsdam sandstone quarries at that time, and among them Parmeter quarry. At that time the upper stratum of this quarry was thin and broken, and was used for sidewalks; the stone was about two inches thick. The surface of this quarry was more broken than that of the other quarries thirty year' ago. I have seen the Parmeter quarry lately; they were drilling and breaking slabs and stones there from one to two feet thick, four to six feet wide, eight to twelve feet long; the *the* quarry surface was smoother than when I first knew it; I have know the quarry being in use for thirty years for building-stone and sidewalks; since 1867 it has largely increased in use and manner of use; the broken ashlar is now in demand; this stone is composed almost entirely of pulverized silica; it will stand any climate and fire; moss and mold never accumulate upon it; it has a very bright, clear, warm color. Have seen the Normal School building at Potsdam; there is no change of
248 color in the stone used in it to be noticed; have also see' the Presbyterian church in Potsdam; it is made of the same stone, and is very beautiful building. I drove up to the south line of Falls lot and there commenced my observations. The stone continued along the whole river front, from 2 inches to 2 feet in thickness, 30 to 35 feet of stone visible in height; this is in the middle of the rock. In the northern part the stone crops out also; the stones on the outside, exposed as they have been, I considered as a good stone, and the quarry as a good one; the stone are not so badly broken; they are somewhat so, no more than ice and our climate would cause them to be; these causes, however, would only affect the surface. There is any quantity of stone on the Falls lot; I have no doubt but you could get good building-stone out of that quarry for broken ashlar, and just such as you get in Parmeter quarry. I examined the Orchard lot; I looked over the
249 cliff; it is from 15 to 20 feet in height; so far as I could see the stone are all right. Could see the strata, but not so well as if I were opposite. They are about the same stone as those above, in my opinion. I did not examine the dip on the Falls and Orchard lot. I made an examination of the Cox lot; stone crop out here within four feet of the bank level and about 8 or 10 rods from the south line of the Cox lot; stone in about the middle of the lot are good in color, and from one to twelve inches in thickness; the pitch is south, and easy on an incline of about one inch to the foot, that is to say, about eight degrees; at this place bank slopes back 50 to 60 feet; débris has been washed out at the foot; trees are growing here 15 to 18 inches in diameter; stone extended down past the middle of the river; pitch about the same as last quarry; it had not been opened sufficiently to enable

me to judge; the layers of the stone are irregular and the color uneven.

In some places the strata are cemented together at a pitch of
250 from 20 to 22 degrees south; it is a good stone, and there is an abundance of it; the strata opened are nearly horizontal; the jail at Canton is of Potsdam sandstone. I never saw any discoloration of the stone used in the jail; it presents an appearance of being of sound and good stone. I made an examination of the Hicks lot; on the southerly portion a place has been opened and a quarry worked. There is a break here where the stone are broken up fine and into fragments. It extended over the surface of the exposed ledge; the stone is of good quality and color; the color is lighter than that of Cox lot. The stone on the Meacham lot crops out in places all over the river front, and is of light color and good quality; the pitch is slight and variable, north and westerly; I think good building could be got out there; river bed opposite is made up of this kind of stone. I examined the

Hale lot. Valley here is about 10 rods wide; stone here
251 show that they are washed off. In the same general height the stone are the same as on the opposite side of the valley; the strata run into river as far as I could see. Parmiter quarry is next below; I observed the pitch in the Parmiter quarry, where they were working in the face of a perpendicular cliff; the dip is southerly and southeasterly, in one place stone are stained more than in the Cox quarry; the strata are apparently cemented together. I examined the Train lot; at southerly line the stone crops out; there is a break in the middle of lot of five or six feet. In the Parmiter quarry there are lines which they call sand-seams which extend downward, then off to one side, then downward again. Pitch in Parmiter quarry is 45 degrees west; strata is of even thickness, this is near the southerly line of the lot, near the middle of the lot the stone disappear from the surface. At this place two acres have been worked out, covered

with a bastard rock. The stone on the top of the quarry on the
252 west side is broken and irregular, and some of the strata are irregular, varying from 6 to 20 inches in thickness. I believe the color is light and even. Here the pitch is northwest, in a small portion in the front the pitch is 65 or 70 degrees; near the north line is another basin of about one acre, which has been worked out. The Potsdam sandstone was formed on the bed of the ocean of disintergeated rock. Material is the same throughout same strata. I believe the upper quarries are just as good as Parmiter quar'y, when they are developed. I made an examination of where they were working at the Clarkson quarry; pitch was southwest; the stone somewhat stained, the color light, and the strata cemented together; the stone presented the same characteristics of all the quarries.

Cross-examination of the witness Sherman:

The first time I was in these quarries was between 1843 and five; I was there last Monday.

253 About 30 years ago, I practiced medecine at Potsdam. Have since practiced at Ogdensburg. I am frequently called as a witness in regard to my profession. Within the last 15 years have been called as an expert frequently. This stone is cemented by heat and pressure, and consists of silica. I made an observation of the Falls lot; the stone crops out here near the river; made an examination with my eye; in the river front stone was good, on the top it was broken. Strata were thin and even, as a rule; did not see any work done there; this lot is the most southerly; the Orchard lot is next. The

stone crops out; the bank is covered with trees. The first thing I would do to develope the quarry, would be to build a railroad from Potsdam, on the side of the river. You could work into that bank. I would build to Orchard lot; the stone crops out in different places. There has been no development of it; I frame my judgment from general appearances. I made a more full examination of the Cox lot;
251 was there about an hour; I saw where they had been at work; saw a great many stones broken there. Pitch there is east and southeast, about 1 inch in 12; I think probable from 8 to 10 degrees. A portion of bank is very sloping; in the middle of the quarry the pitch of the upper strata is from 20 to 25 degrees south, lower strata 11 degrees; pitch is nearly every direction there. This of course breaks up the strata and changes it. The general pitch is south or south of southwest. On the top there are places where the stone is broken for distance down. I can't tell how far they have worked into the quarry, 25 or 30 ft. perhaps; did not see any stone there that were wedg'-shaped; I did see such in other places. There is only place here 3 or 4 feet in width, where the stones are broken. This is near the middle of the quarry. The stone on each side are good. The Hicks' lot is next; stones are good and quarry is good. Color uniform, and pitch also; this has been worked some. I would build railroad even up here. There is a road to this point. I don't think I saw
255 at either lot such a stone as the specimen here as to form. I did see many which could be made like specimen. I saw some stones with sand holes in them. To make smooth surface you would have to work these out, and it would not pay to do so. On Meacham lot there is a bluff of stone. It would not compete with Parmeter. This lot has a brook in it. The bank continues about half way across the Hale lot, and the brook runs in a valley from 5 to 100 feet. It is a swa*il* here, and has swamp-grass in it. There is no low place corresponding on the other side of the river. In the bed of the stream I found loose stone in layers. In the swa*il* stone were washed out. I found the stone on each side of brook, which runs in a valley, varying from 50 to 100 feet wide, and the same strata corresponding on either side I concluded the stone had been washed out, forming this valley. My idea of a quarry is a ledge of rocks where stone may be taken out by any mechanical means. Any ledge is a quarry. The cliff at Falls lot is a quarry, and is as good as the others if developed.
256 There are joints in Parmeter quarry. They are not an injury. Quarries are the better for joints. There is a difference between breaks and joints. I saw joints in Parmiter quarry when I first knew it. Emmons' survey was made in 1840, I believe. Emmons set the pitch down as southwest. I think he said it was possible to get out four to five feet wide. I did not see any flagging at the Cox quarry. In 1844 they got out large flagging stone in Parmeter quarry. Saw some 2 feet square and 2 inches thick. I think Emmons reports that larger sheets can be taken out now than in 1844.

Redirect examination of the witness Sherman by the defendant's attorneys:

When I have been called professionally as a witness by the people it has been in regard to blood-stains, the human body, handwriting, and such matters.

Redirect examination:

When I say a solid stone and solid cliff, I mean a cliff com-
257 posed of stone wholly—stratified, however. I saw such at the edge

of the river, stratified. It is not necessary to build a railroad to get out these stone. You can take out these stone by beginning at top and use refuse for road.

ISRAEL P. HUNT being called as a witness for the defendants, and having been duly sworn, testified:

I reside in Potsdam, and am 55 years old. Am now superintendent of the Potsdam Sandstone quarry. When I was 20 years old I quarried stone at North Troy, Vermont, and built a mill; from there I went to Burlington Center, Vermont; was building there large grist mill; was to work at all about eight months there. Next went to South Troy, which is a rough quarry for building stone; was there about two months, then went to Derby; quarried stone there, then went to South Troy to get stone; worked there three or four months; then went to Sheldon Creek, Vermont, and worked a few months; stone here was unstratified limestone. Then I went to Sheldon Falls, Vermont, and worked
258 about three months in the same kind of a quarry. Then went to Enosburg and quarried stone; was engaged here blasting for heavy blocks. Next went to Sutton Flats, Canada; worked here about a year, building a large church. Next I went to Denham Flats, Canada; worked in stone business about a year and a half. Next went to Conne'ticu*l*t, vicinity of Hartford; stone there is stratified; was engaged there about two years. Next went to Petrole*r*um Center, Pennsylvania, where I worked as stone-cutter and builder for about two years; stone is not stratified. I then came Ithaca; I had the general superintendence of the quarrying and building of the first Cornell University buildings; we got the stone out about 100 rods east of the building; it is a brown stratified sandstone, with perpendicular breaks but no sand seams; I was there about one and one-half years. Next went to Co*u*rtland, to work on normal school; foundation and the water-table with the same stone, color a little
259 lighter; had superintendence here for about a year; this was in 1866 or '7. I next went to Potsdam to build the normal school; had superintendence of the work. It is built of sandstone from Parmiter quarry. It was commenced in December, '69, and continued in '68 and '69. In taking charge of the work I had to visit Parmeter quarry. Passed by the Train lot. Commenced the 17th of March, 1873, at work for the Potsdam Sandstone Company, in the Parmiter quarry. Parmiter stone is a good working stone, but broken considerably. We find a change of stone as we go down. Every time we strike a sand seam the strata changes. These sand seams are from 1 to 6 inches thick, and are filled with sand not hard enough to form stone. These are perpendicular, and filled with dirty sand. At the bottom we strike a strata pitching southeast. The stone is *is* from 6 inches to 2 feet thick, with an even thickness smooth as a board. When I came they were down to eight feet; now are down to twenty-three (23.) You cannot get them out easily. Stone is stratified. The
260 stone above are more broken and thicker; not as true as those below; the lines are not so nearly parallel. There is an opening on Cox lot, 12 to 15 rods from the Hicks line, 30 to 40 feet long, perhaps 15 feet back from which I understand they got the jail stone. At the top, for about 3 feet in depth, the stone are broken; after that they are stratified, 4 to 10 inches in thickness. There is another opening south of this 15 feet long; 6 or 8 feet back is the ledge; the stone are good, stratified, and of good thickness. I made an excavation about 4 feet below where they had commenced. We worked about 15

men for about 15 days. We made an excavation 120 feet long up the river; started about 20 feet from water; worked in about 12 feet. We took out about 67 cords of stone. We used about 800 or 1,000 feet of flag stone. The flage stone went into the new capitol at Albany. Some went into Roynor and Bartlett block, Boston. We had during
261 July to get stone for the block. We discontinued the work here because we could not get them in time. We wanted stone of certain dimensions. We discontinued about 25th of July. The stone we got out we make a good broken ashlar. I examined all of these lots, commencing at Falls'. Have made openings in quarries. On the Orchard lot one can see the stratification part of the way. The color is red. The stone on top of Parmiter quarry is similar to the top of this, but not so much broken.

(Various specimens of stone shown witness, who says:) Specimen No. 1 is from Falls' lot. Specimen No. 2, from Orchard lot. Specimen No. 3 from Cox' lot. This stone will bear 25,000 pound pressure to the cubic inch. Stone No. 4 is from Hicks' lot. No. 5 is from Meacham. No. 6 from Parmiter. No. 7 is from Train lot.

(The specimen stones are shown to the jury.)

Witness says: These are fair average specimens of the quarries from which they came. I have worked on the Hicks lot. The
262 slab there look large and evenly bed'ed; on the Hale lot, stone show all along.

(Specimens are identified.)

Witness Hunt, on his direct examination, further testified:

There is a knurl of sandstone on the Parmeter lot where the stone is all crushed to pieces. The north end of the quarry is undeveloped. The stone there is thin and broken, like that of the upper quarries. I made these maps and diagrams myself.

(Maps of quarries and diagrams put in evidence and received.)

In the upper quarries there is not so much iron as on the Parmeter lot. I have used the Medina stone, at Medina. Potsdam sandstone is used for flagging, for furnaces, for water-tables, cornices, window-sills and caps, pilasters, foundation stone, &c. It is a smooth and handsome stone, and a first-class building material. I estimate the value of the Falls lot, in December, 1872, at $4,000; the Orchard lot at $2,500,
263 the Cox lot, 10,000; Hicks lot, $3,000; Meacham lot, $4,000; Hale lot, 1,000; Parmeter lot, $15,000; Train lot, $5,000. I am acquainted with the value of the stone in Boston. It is regarded as good stone there. The profit on cord stone is one dollar per cord. Rough ashlar brings 25 to 30 cents per superficial foot. It costs 7 cents for getting out, 4 cents for cutting, 4 for transportation, and 2 cents for other expenses. The value of flagging is 10 for common, 12½ for good, 30 cents for 6-foot superficial; that that brings 10 cents, would cost from 4 to 6; 15 cent flagging cost same; old buildings stand well as to appearance and otherwise. The Episcopal church has no fracture in a stone in the wall; it is clean and fresh. Roymond's buildings, Wallace House, and Usher and Tappan's House, are all good and sound. There is nothing in the normal school building that would affect the general good appearance.

Cross-examination of the witness Israel P. Hunt:

264 Went to make engagement to superintend, about the 1st of January, 1873, for Gordon, Foster, Watkins, Parmiter and Cox. I don't know as I talked with Watkins and Foster. This was in De-

cember or January. I stayed until I went away in February. Have been engaged for the defendants and Cox since December, 1873; was engaged by Gordon before that; have been engaged for the company since December, 1873. I was paid from 17th of March, 1873. I know Butler, and have seen Mr. Bingham and Mr. Cook. I cannot say that I saw all three together. According to my recollection, I did not see them together. I went up to quarry with Butler. I think this was sometime in 1874. Butler wanted me to draw division lines. The value of the quarries was talked about. I was not asked what they were worth. I do not know whether I said I would rather have a thousand dollars than these quarries, or not. In 1873 I took about 15 men and went to Cox lot to get out a large number of stone, but could not get them from that quarry. We found an abundance of other stone
265 for corners, rustic stone; in fact all we wanted of those kinds, but did not find as large stone as we wanted. I made a map of the quarries. I think this work was the year before the sale of the mortgage. In 1874 I was superintendent of the work in the Cox quarry. We had contracted for some large stone, 3 feet by 6 and 2 feet by 6; can't say how many. I think we had contracted for about 50 of that class. We didn't find any of that class; not a single one. We worked 15 men 15 days; but we got out some rusties, 200 of which we used. We got all the rustics we wanted. I made the map I have spoken of on a scale of $\frac{1}{2}$-inch to the rod; I didn't take any measurements; I took Parker's measurements; he was witness for the plaintiff. Gordon and Watkins were both on Cox lot. While we were at work there we lost over $1,000 on Cox quarry—that is, the stone we got out of that lot fell short at least $1,000 of paying labor in getting them.

Redirect examination:

266 The most of this money would have had to be expended in opening the quarry.

GEORGE ROBINSON, a witness called for the defendants, being duly sworn, testified as follows:

I reside at Canton, and am 57 years of ago. I was a member of the committee of building the county jail at Canton. I have done some building. The jail was 44 by 74 feet. It is a building of two stories and a basement. The stone were taken from the Cox quarry. I saw the stone that were got out, and am familiar with the jail. The stone in the jail are perfectly good. The sample before me is of the same kind of stone. There are some stone for Canton jail taken from the east side of the river; that is, the covering for the cells—the fronts $3\frac{1}{2}$ feet and 2 feet wide and another 8 feet by 2 feet.

Cross-examination of the witness, George Robinson:

267 The jail was built in 1858 or '9. I was supervisor in the years 1858 & '9. Landford was the contractor to build the Canton jail. He claimed he had difficulty in getting the stone, and on that account we paid him a sum in addition to the contract price. The University building at Canton is of brick. The new Presbyterian church is built of stone from Potsdam Junction, six miles beyond Potsdam.

The clerk's office is now being built of the Gouve'neur stone, with Potsdam Junction stone for trimming. The Herring Library building at Canton is of Potsdam sandstone.

H. H. P. LANG, called as a witness for the defendants, being duly sworn, testified as follows:

I reside at Potsdam Junction and am 67 years of age. My last business was marble business. My first experience in the stone business was fifty years ago, in the Parmiter quarry. Have known the Potsdam quarries from that day till now. For 30 odd years I lived within three miles of them, in 1849, '69, '72, and '3. I examined the
268 Parmeter quarry with reference to making a purchase of it. I have also examined river with reference to taking jobs for running logs. We supposed a dam would have to be made. We found we could get just as good stone for it in the river as on the shore, and we found the same bed of stone went up as high as the highest point; it has no interval or break in it. I estimate in December, 1872, the value of the Orchard and Falls lot to be at $12,000, the Cox lot at $12,000, the Hicks lot at $8,000, the Meacham lot at $8,000. In 1872 the Parmiter lot was worth $15,000. The stone on the falls lot are a nice stone. I commenced my examination of it at the bottom of the bank and went up about fifty feet. Found it all of stone and of good quality. I went to the Parmeter quarry first, then went across the river. I examined the stone on the Meacham lot and found them in abundance. I examined the ravine and stone in it, and found flat stone stone there.

269 Cross-examination of the witness, H. H. P. Lang:

I was at these quarries a week ago last Tuesday and saw the stone and holes there along the brook. I called the attention of a gentleman who was with me to the holes. There were some made at the foot of the brook. There is the same kind of stone in the river and the brook. I wanted to buy these lots once. I would not give five thousand dollars for them now.

I assume that there are good stone in these lots and lots of them.

Redirect examination of the witness Lang:

Since proposing to buy these lots I have invested my money in building elsewhere.

WILLIAM W. SMITH, being called as a witness for the defendants and duly sworn, testified as follows:

I am a farmer and reside in Pierrepont. Have worked in sandstone about eight years, from 1866 to 1874. I knew it a number of years
270 before that. I know there is knurl in the Parmiter quarry. Nice stone lay up against the knurl. Have formed an opinion as to the value of the quarry. The Parmeter quarry in 1872 was worth $12,000, the Train lot is worth $5,000, the Hale lot is worth $1,000, the Meacham lot is worth $4,000, the Hicks lot is worth $4,000, the Cox lot is worth $8,000, the Orchard and Falls lot' are worth $5,000 each. The Parmiter quarry went down four to six feet before we reached good stone. The general appearance of all the lots is the same. The other quarries do not show any more broken stone than the Parmeter quarry does where it is not worked. I live opposite the Falls lot. There is a well on my place about 130 feet from the center of the road and about 40 rods from the river. At the bottom of the well, about 17 feet from the level of the ground, I found sandstone pitching south.

I never knew of any stone being taken from the Orchard lot. I can tell from my experience as a quarryman as to the character of
271 the stone I could not see. There is a *there is a* rough stone on all of these lots. All of the uncapping of quarries is a loss.

On being cross-examined the witness, William W. Smith, said:

I knew of Gordon working in the Cox lot, and that they didn't get any good stone. I worked for Gordon in 1872. I don't know of any demand for stone that cannot be supplied from the Parmeter quarry. I can't say that I told Peter Post or Richard Downey, at my house, that I could be a good witness for Butler; I don't remember that I did.

LEVI LEE BARGE, a witness for the defendants, and duly sworn, testified as follows:

I am a practical quarryman. Have worked at the business ever since 1871, except four months. In 1873 I worked for the Sandstone Company, under Hunt, five or six days in the Cox quarry, which had been a little uncapped. We found good stone there. This quarry is broken at the top, and presented the same appearance as the
272 Parmeter quarry when that was uncapped, except that I think the top of the Parmenter quarry was more broken. I observed the opening in the Train lot, and saw good stone in layers. I know these specimens here in court; they are from and are fair specimens of the various quarries as indicated. I have seen all of the quarries. They general appearance is full better than that of the Parmeter quarry; they are good and valuable quarries. Good stone can be got out of them.

JOSEPH B. AUSTIN, a witness called for the the defendants, being duly sworn, testified as follows:

I reside in Potsdam. Up to last January, for several years I had been deputy sheriff of the county. I was acquainted with the financial standing of Gordon, and with property in general in Potsdam in the year 1872. Gordon was said to be of good financial standing at that time, and that was my opinion. I should have said he was worth $25,000. He had four or five farms to my knowledge, always
273 had money, and his credit was good. I have known these quarries 47 years. Have had something to do with them. Have examined quarry lots with the exception of Parmeter. I went the whole length of them and examined the thickness of the layers and the general appearance of them. The Falls lot is thicker and heavier than any other. The stone is good on that and on the Orchard lot. The Cox quarry is more broken, it is better as you go down. There is no fresh opening on the Meacham and Hicks lot. Stones cropped, and showed good stone. I think the bank is full of good stone. The Meacham lot is more broken than the Hicks. I formed an estimate as to the value of these quarries. In December, 1872, they were worth as follows: the Falls lot $5,000, in my opinion; the Orchard lot $3,500; the Cox lot from $8,000 to 9,000; the Hicks and Meacham $4,000 each; the Hale lot worth $1,000; the Parmeter $12,000 to $13,000; the Train lot $4 to $5,000. I have some knowledge of the
274 stone for building purposes. The top of the Clarkson quarry is broken three or four feet down.

Cross-examination of the witness Austin:

I did not know that Gordon was in debt in 1872. I knew he held farms under his control. I only knew what I heard. I did not know anything of the science of geology. There has been no effort to work the Hicks and Meacham lots. I heard there was a failure in the attempt to open the Cox lot. I know that the most of the Potsdam

sandstone are taken from the Parmeter quarry. I am a man of little property. I had thought of buying the lots once. I would not give $3,000 for them. I wouldn't give anything for these quarries mortgaged to plaintiff. I would not give $2,000. I would not buy them. I would not give that amount for any property of 22 acres in Potsdam, with scattering stone on it. I would not buy any real estate of any kind.

275 The defendants here offer to show that at the time of the making and delivery of said certificate the said defendant Gordon was not prosecuted for debt by legal process.

(Which evidence offered, the plaintiff objected as incompetent and immaterial, and the objection was sustained and the evidence excluded; to which ruling of the court the defendants, by their counsel, severally excepted.)

CHARLES COX, a witness called for the defendants, being duly sworn, testified as follows:

I reside in Potsdam; have lived there for 50 years and am a business man, doing business generally. I am acquainted with all kinds of property in the town of Potsdam, including the quarries and the sandstone property.

(The defendants offer to show by this witness that he has been acquainted with the values of property in Potsdam and vicinity for 20 years past, and that there was a large shrinkage in real estate in whole of that town between December, 1872, and July 18th, 1874, on account of commercial revulsions generally.

276 This offer was objected to by plaintiff's counsel and excluded, to which ruling the defendants severally excepted.

The defendant, thereupon made the same offer, confining the shrinkage to quarry property in Potsdam for same causes. This was also objected to by plaintiff's counsel and excluded, and defendants severally excepted.)

The witness thereup' testified: I have been familiar with Potsdam business. Several lumber companies failed in 1873. It checked building, stopped growth of village, and stopped building. I was well acquainted with Samuel B. Gordon at the date of the certificate. His credit was good and I did a good deal of business with him. I thought he was worth $30,000 to $40,000. I am familiar with the value of the lots, and have bought and sold some of them. They all present the same general appearance. In 1873 they were all known as quar-

277 ries and quarry lots. I had formed an opinion as to their value in 1872 as follows: The Falls lots, $5,000; the Orchard lot, $2,500; the Cox lot, $7,500; this Hicks lot, $5,000; the Meacham lot, $5,000; the Hale lot, $1,000; the Parmeter, $15,000; the Train lot, $5,000.

Cross-examined:

Not worth so much now, business has depreciated it more than other property in vicinity. Made estimate in 1872. Have known that Parmeter quarry has and could sup'ly all deman's for stone if wanted to worke them; give $5,000. Don't remember any such thing as application to remove Gordon as executor; don't recollect making affidavit.

(Paper shown witness who says:)

That is my handwriting.

AUG. 17, 1871.

(Paper read:)

Don't think question of solvency mooted them. Can't fix any value of the lots as quarries to-day. Is no business at present, not
278 working them. Are working Parmeter quarry, that is worth $15,000.

Redirect examination of the witness Charles Cox:

Clause in affidavit reads as follows:

"Deponent further says he is a householder and freeholder at Potsdam aforesaid, and is worth in property not exempt from execution over and above all his debts and liabilities thirty thousand dollars and more, and is willing, and hereby offers to become, surity for said Gordon, for the faithful performance of any or all of his duties under said will, whether as executor or trustee or both, and for the payment of any and all moneys which shall be found due from him to said estate, or to any of the legatees or beneficiaries thereunder or their legal representatives.

"Sworn to Aug. 14, 1871.

(S'd) "CHARLES COX."

WILLIAM WASHBURN, called as a witness for the defendants, being duly sworn, testified as follows:

279 I reside in Boston; my age is 68; have been an architect for 45 years. I have used Potsdam sandstone as a building material in several large buildings in 1873. We used it for every purpose in the building where it could be used, for pilasters, balustrades, for inside of safes, instead of brick or iron; it is better for the inside of safes than anything except steel. It is the best building stone in my knowledge and the best stone to retain its color and quality. I visited the quarries in 1873 sometime in September, I made an examination of them on the right-hand side going up the stream. I went to Cox lot. I went to see if we could get stone enough; there was plenty of stone and of good quality; the whole quarries were of the same general formation. The top of all the quarries were alike effected by the elements. The means and facilities of quarrying were good.

The witness Washburn being cross-examined, testified:

I observed them getting stone in the Parmeter quarry. I got
280 more than 200 stone with a dark tint from Cox quarry—all we wanted; desired these stone as soon we could get them. We got slabs for safes and some flat stones. There is some iron rust on some of the buildings in Boston built of the Potsdam sandstone; unless I could get stone the size I wanted, I shouldn't contract. There are no buildings in Boston entirely built of Potsdam sandstone. It was used as I have stated in the construction of five buildings only. I think there was 150 stone in those buildings showing iron rust.

GEORGE B. SWAN was then called as a witness for the defendants, & being duly sworn, testified as follows:

I have lived in Potsdam 24 years and am a builder, manufacturer, and contractor. I know Gordon and am acquainted with his reputation, and credit for solvency in 1872; he was worth in the general estimation in December, 1872, from $30 to $40,000; I know the
281 quarries in question and know the stone as a builder, and what the value of the stone is. It is worth from 12½ to 25 cents for

flagging rough ashlar, from 25 to 30 cents per foot, and broken stone, $5 per cord. I have examined the quarries with reference to their value. In December, 1872, the Parmeter quarry was worth $13,000; the Falls, $4,000; the orchard, 3,000; the Hicks, $3,000; the Meacham, $4,000; the Train, $3,500; and the Hale lot, $500. They were all except the Hale lot known and called the quarry lots.

The witness Swan being cross-examined, testified as follows:

Flagging is worth from 12½ to 25 cents per foot. The last flagging I bought was in 1876 for 20 cents per foot. This year it was 15 cents per foot for cross-walks, rough ashlar is from 25 cents to 30 cents per foot.

282 I bought 200 feet this year for 25 cents per foot, labor in 1872 was $1.50 per day, now $1.00 per day. I could make just as much profit now as I could in 1872 if the demand was as good. Cord stone is worth $3.00 per cord at the quarry now, and was worth the same in 1872. I never knew good stone to be less than $2.00 per cord. I have bought culled cord stone at $1.00 per cord and used it for cellar wall. I build houses and am a manufacturer of sash and blinds.

Question. Would you give $3,500 for Cox quarry?

Answer. I would be very glad to, if I had the money.

LUKE USHER being called as a witness for the defendant, being duly sworn, testified as follows:

I reside in Potsdam and have been cashier of the National Bank of Potsdam and its pred'cessor 25 years. I knew Samuel B. Gordon all

283 of that time, and his financial standing. In December, 1872, that standing was good; I regard' him then as worth $25,000 and upwards. Commencing with the summer of 1873, there was a great depression of value in and about the town of Potsdam.

(Checks signed by Foster and by Foster and Watkins, marked Q. R. & S., for identification, shown witness, who says:)

Those signed by Foster have his signature; those by Foster and Watkins have Watkins' signature; on R there is S. B. Gordon's endorsement—all were paid; on S there is L. B. Gordon's endorsements.

Cross-examination:

There is nothing on checks to indicate that they were paid; the books would tell the whole; haven't the books here; they are under the control of the bank; Gordon is a lawyer, and in business he used a great deal of money; I was called upon to certify to his financial ability; I declined to do so.

GARDINER R. CRANDALL was then called as a witness for the

284 defendants, and being duly sworn, testified as follows:

I am 57 years old, and have resided in Pierrepont, near the quarry lots, for 54 years. I know these quarry lots and have known them for 40 years; I have used the stone and am acquainted with it; I have examined these quarry lots and formed an opinion as to their value. In December, 1872, they were worth as follows: the Falls lot, $4,000; Orchard lot, $3,000; the Cox lot, $5,000; the Hicks lot, $3,000; the Meacham lot, $3,000; the Hale lot, $800; the Parmeter lot, $10,000. They were all called sandstone quarrys except the Hale lot. I have seen the opening in the Cox lot. The stone lay in square pieces and in layers. There is plenty of good stone in that

quarry. On the Falls lot the layers extend below the bed of the river. The Cox mill and starch factory were built of stone from the Falls lot.

285 The witness Crandall, being cross-examined, testified as follows:

My farm runs down the river opposite the Meacham lot; I could not tell what it would cost to get $1,000 worth of stone on those lots mortgaged to Butler; I don't know but it would cost $2,000 to get out $1,000 worth of stone. The Falls lot, as farming land, is not worth more than $25 per acre. I thought you could get stone out of quarrys mortgaged to plaintive if they were developed as well as you can get them out of the Parmeter quarry.

HENRY WATKINS, being called and sworn as a witness for the defendants, testified as follows:

I am one of the defendants, and have lived in Potsdam 24 years; my occupation has been that of merchant, lumberman, and furnaceman; I remember Gordon's applying to me to take stock in the Potsdam Sandstone Company; I heard Hitching's testify as to the conversation, and have no recollection of having such conversation with him;

286 I went to New York the day after election in 1872, and did not return till the 1st of December; Gordon applied to me to examine the quarries and to take stock in a company proposed to be organized. I had been acquainted with the quarries for years, but I went over again the entire territory of the quarries and examined them with a view to ascertain their value. I formed a judgment as to their value as follows: The Train lot, $8,000; the Parmeter lot, $8,000; the Hale lot, $1,000; the Meacham lot, $5,000; the Hicks lot, $5,000; the Cox lot, $8,000; the Orchard lot, $5,000; the Falls lot, $8,000. Gordon had a talk with me as to what he proposed to do. He said he desired to organize a stock company and sell the company the quarry lots at a stipulated price. He proposed to make the stock $150,000, and sell paid-up stock at fifty cents on the dollar for the stock. He represented that he had talked the matter over with George F. Paddock, a banker of Watertown, with the cashier of Fort Stanwicks Bank, at Rome,

287 with Pratt, of Boston, the president of the Ogdensburg and Lake Champlain Railroad Company. He asked me to take some stock in the company and first I declined. I told him I was involved by endorsements so that I did not want to embark or invest any money in a new enterprise. Some days after Gordon asked me if Foster and I did not have some notes against De Marquis Parmeter, the former owner of the Parmeter quarry. He said he would like to buy those notes and sell us stock for them, for he could pay Parmeter what was going to him in those notes, and they would be the same as money to him. I told him I would advise with Foster and let him know the conclusion. I saw Foster and stated to him what Gordon had said, and he finally concluded that we would sell the notes for stock in the sandstone company. Foster and I saw Gordon afterwards and told him we would each take $3,000 worth of stock, to be paid for by the Parmeter notes.

288 A few days afterwards he came into Foster' office. I was there. He had an agreement drawn.

(The paper is here shown witness.)

Witness thereupon testified: This is the paper.

Names.	Amount.
H. WATKINS	$3,000
E. W. FOSTER	3,000

The witness further testified: We signed the certificates of value at the same time. The papers were all left with Gordon. At that
295 time I did not know or understand that Gordon was to use them to get any money of Butler. I did not sign the certificates or either of them or any of the papers with any intent to defraud Butler or any other person. I had not the slightest idea that the appraisal was be used in getting a loan from any person. The Parmeter notes were delivered to Gordon and the company was organized about November, 1873.

The deed conveying the quarry lots to the company was here offered and received in evidence, and read as follows:

This indenture, made this seventeenth day of November, in the year of our Lord one thousand eight hundred and seventy-three, between Samuel B. Gordon, of Potsdam, St. Lawrence County, New York, and Jane Anne, his wife, of the first part, and the Potsdam Sandstone Company, of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of one hundred and fifty thou-
296 sand dollars to them duly paid, have sold and by these presents do grant and convey to the said party of the second part, and its assigns, all that certain piece of land situate in the towns of Potsdam and Pierrepont, in said county, and bounded thus: Beginning at a point in the middle of the highway leading from Potsdam Village to the village of Ellsworth and the town of Colton, on the west side of Rackett River, the northwesterly corner of twenty-six & $\frac{43}{100}$ acres of land, conveyed to said Samuel B. by Aaron W. Frost, by deed dated March 1st, 1872, and recorded in the office of the clerk of said county March 5, 1872, in book 92 C of deeds, at page 154, and running thence southerly along the middle of said highway, as it turnes included, about one mile to a point the middle also of the highway or street in the village of Ellsworth, in Pierrepont, called Mill street, and leading easterly from said first-mentioned highway to the site of the Gardiner Cox Mills,
297 now owned by said Samuel B.; thence easterly along said Mill street or highway, the middle thereof, to the first turn thereof, and thence south 80 degrees west, to the middle of Rackett River; thence northerly down along the middle of said river about on'-fourth of a mile, keeping along the middle of said river as it winds and turns to the town of Potsdam; thence south 62 degrees west, along a line the boundary between Pierrepont and Potsdam, to the westerly bank or shore of said river, at low-water mark; thence northerly along said shore at low-water mark, about three-fourths of a mile, to a point the northeasterly corner of said twenty-six & $\frac{43}{100}$ acre lot, south 61 degrees 30 minutes west, along a line to the place of beginning; containing about one hundred and four & $\frac{84}{100}$ acres of land, be the same more or less, with the appurt'ances; and all the estate, title, and interest therein of the said parties of the first part; and the said Samuel B. Gordon doth hereby covenant and agree to with the said party of the second part and its assigns, that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, and

its assigns, he will forever warrant and defend against any person whomsoever, lawfully claiming the same or any part thereof.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

SAMUEL B. GORDON. [L. S.]
JANE A. GORDON. [L. S.]

Sealed and delivered in the presence of—
HENRY P. FOSTER.

298 STATE OF NEW YORK,
St. Lawrence County, ss:

On this seventeenth day of November, in the year one thousand eight hundred and seventy-three, before me, appeared Samuel B. Gordon and Jane A., his wife, to me personally known to be the same persons described in and who executed the foregoing instrument, who severally acknowledged that they executed the same, and the said Jane A., on a private examination by me apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

HENRY P. FOSTER,
Notary Public.

(Endorsed on back:) Deed; full covenant. Samuel B. Gordon & wife to Potsdam Sandstone Company. Dated Nov. 17th, 1873.

299 ST. LAW. COUNTY, *ss:*

Recorded on the 25 day of Nov'r, 1873, at 4 o'clock p. m., in book No. 97 A of deeds, at page 454, and examined.

T. H. FERRIS, *Clerk.*

The witness further testified:

Before making these appraisals of value I had heard what quarries had been bought and sold for in that vicinity, and I had formed a comparison in my own mind as to the value of these and other quarries; I had known of the use of the stone, and the prices for which it was sold.

I first heard of what use Gordon made of the certificate of value in December, 1873, about 10 days before Gordon went to jail, and I told Foster of this right off after hearing of it. I remember seeing plaintiff at the American House in 1874. He asked me, after showing me the certificate, if the Sandstone Company was going to pay the in-
300 terest on his mortgage. He wanted to know why we did not take hold and get Gordon out of jail, and let him go to work at his business; he said there was a fortune in it. He then took certificate out of his pocket; he asked me if I thought the land would sell for enough to pay the interest on the mortgage. I replied I did not know whether it would sell for enough to pay for the mortgage. I think I told him I thought it would, provided the business was continued and developed; that was on Saturday. He came to my house next day and stayed about twenty minutes; same kind of conversation took place. He said it was a pity to have Gordon lying in jail; we ought to try and get him out. I did not say I had changed my mind, and that I did not think it would bring enough to pay the mortgage. We usually called the quarries the quarry lots. I knew that Gordon handled a good deal of money and had property in his hands. I supposed him to be worth from $25,000 to 50,000.

301 The witness, Henry Watkins, being cross-examined, testified as follows:

Mr. Gordon is in St. Louis.

The witness thereupon testified in answer to the cross-examination:

I know that Gordon's deposition has been taken in behalf of defendants in St. Louis. I have seen a copy of it in the hands of my counsel. Have seen it within twenty-four hours. Am not a man of wealth; was worth $100,000 in 1871; am not now; have met with losses, $15,000, by Hitchings & Brown; am not worth $75,000; the four lots are honestly worth $16,000 now; I know a farm worth that; I am not a man of wealth; was worth $100,000 in 1871, but not now; have met with losses, $15,000, by Hitchings and Brown; am not worth $75,000. The Priest farm is worth $16,000; I would not give $8,000. Have not means to buy. It is not a fair question whether I would take the quarries at $8,000.

302 The papers were dated by the parties who drew them; not by me. The certificate of value, which Gordon let Butler have, is dated the 12th of December, and was signed on the 18th of December, at the same time that the other agreement, No. 3, which Foster and I made with Gordon, was made. I don't know why it was so dated. My family was with me in New York. A few days after I returned Gordon spoke of his scheme. The substance of it was he urged me to subscribe for some of the stock. He said he proposed to engage with a capital of $150,000, and to sell the quarry lots to the company and take his pay in stock and to sell paid-up stock to any one at 50 cents on the dollar; this was in December, in the forepart of the first week. There was not much snow at that time. Nothing further was said. The next interview was within a day or two, at his office; don't remember that anything special was said. At one time he asked me to ride up

303 to the quarries with him, I think, with a livery horse. It was a week or more before. There was a little snow but no sleighing. We started along in the afternoon and got back at night. I don't remember whether any one was at work at the Parmeter quarry. We went on the bank of the river. I don't remember of any ice being in the river. This was the first time I sent with re'rence to making a valuation. We talked over the matter after we got home. We did not fix the value. Gordon and I talked about the comparative value. I don't know as he said anything as to value. I think he showed me a diagram.

(Insert diagram.)

Gordon estimated lots, and I agreed with him after looking his estimate over; I did not form my opinion from his; he expected to obtain the subscription of other parties to the stock. I understood the certificate was to be used to obtain subscriptions; he wanted to send it

304 to Watertown and Rome; I acted upon my own judgment, and not according to his. I can't remember whether anything of the kind mentioned by Hitchings did take place; I have no recollection of seeing any subscription paper at that time; I can't recall seeing any such paper as to value until fall of 1872; I got my scrip in November, 1873; I did not think to bring it with me; I took $3,000 of the stock; I did not pay money for it. De Marquis Parmeter is here; he is the party against whom these notes were. I am one of the trustees of the company. I told Gordon at first that I did not want to go into it at that time. The Parmeter notes, I think, were made in 1869; they were in Foster's hands when we agreed to take the stock. After I had talked with Gordon, I saw Foster and told him what Gordon had said. He

and I concluded to go into the company; this was before the 18th of December. Foster and I went in as trustees of the company. I think the notes were paid over a short time after; I did not hand the
305 paper over; Foster had them. There were two certificates in the handwriting of Brown; that was the right-hand man spoken of in the letter; I did not put any money into the company. The deed from Gordon was recorded November 25th, 1873. I never saw the deed until I saw it in the hands of Tappon. No one but Gordon put in any money; did not know that he got the money from Butler, or any one else; this was in 1872; I did not borrow money from him until 1873.

Three checks shown witness, all signed by Gordon, the first for $500; 2nd, 1,500; 3rd, 2,500.

(Printer insert checks; see page 52.)

The $1,500 is payable to my order that I had from Gordon. The 3rd is endorsed by Foster. Foster and I had that money. In December, 1872, we agreed to take the stock; we got the money of him; I did not know or hear how he got the money. I don't remember whether I had a bank account in 1873; I think I had an account; I occasionally went for discounts; did not apply to Gordon upon this. Foster and
306 Watkins were not doing business as a firm. There were no transactions of a similar nature before this; that $2,500 went into the bank to Foster's credit. The $1,500 went to Foster's credit, I suppose. I handed it to Foster. I don't know that Gordon ever endorsed a note for me; he never did before, that I remember of; don't know that he has endorsed one before or since; I don't remember of any one but Gordon speaking of the value of the Falls lot; I heard more talk about the Cox lot; heard Parmeter speak of the Cox lot; I have heard him speak about it a good many times; also his brother; I have heard no one speak about the value of Hicks lot except Gordon. The Sanford quarry sold at assignee's sale, in 1874, for $600. I have known of a large amount of stone being sold out of that quarry in the last 15 years; most of the stone have come from the Parmeter quarry; I know of the jail stone being got out of the Cox quarry, & some from the Cox quarry that went into the village.
307 I inquired whom he owed; he said he had borrowed $10,000 of Butler, & had given a mortgage on the property. I told him he had wronged us, the company. The company was Gordon, Cox, Foster, Watkins, and no others. I have been a member of the sandstone company from its organization. Hunt went to Boston on the Boston job. He was the superintendent at $1,800 per year. The Boston job was in 1873. The majority of the stone came from the Parmeter quarry.

I still claim to be, as one of the company, one of the owners of the Parmeter quarry. Since Gordon failed there has been no dividend. I understood the certificates were made for the purpose of aiding in procuring subscribers to the company. At the time of the certificate I understood that there was a mortgage to the St. Lawrence University, at Canton, on the Parmeter quarry for $8,500. Since Gordon's failure I have understood that Cox had also mortgage of $3,000. I did not know of it before. The whole property is estimated at $48,000.
308 The stock was to be sold at 50 per cent. of its par value. $20,000 of stock was to be retained by the company as a reserve fund. I was not endeavoring to get up a company. I had not heard of Butler connected with the company. Did not make certificate to get money of Butler and Paddock. Gordon told me that Paddock had agreed to

take stock. $20,000 of stock was to be set apart for the benefit of the company. Had heard of Paddock, of Watertown, who I understood was wealthy. Gordon had said he had given him to understand he would take $20,000 worth of stock on the basis of the property at $48,000, stock at $150,000, at 50 cents on the dollar. The certificates were got up to induce people to take stock. Nothing else to go in but the property appraised. The company was to have $20,000 of stock. In July, 1874, I was at Potsdam. I think I understood there was to be a foreclosure sale. I read the notice Butler caused to be served
309 upon me. I don't remember where I was on the day of sale. Bridges' Hotel, the place of sale, is within twenty rods of my place of business. I don't remember of seeing Butler that day. I kept away from the sale because I did not intend in any manner to recognize the claim Butler made upon me. I did not suppose at the time I signed this certificate that Gordon was going to use it to borrow money. If I had known it I still should have signed the paper.

The witness being re-examined by defendant's counsel, testified as follows:

I did not date this certificate of the agreements. The certificates were in the handwriting of Deacon Brown. The agreements were made in the handwriting of Gordon, including the date. The diagram attached to the certificates is in Gordon's handwriting. I did not know or suppose he was going to get any money of Butler. Before borrowing this $4,000 Gordon had not endorsed for us or loaned us money. He had endorsed for Hitchings & Brown a gold note for $10,000, payable
310 in Montreal. We called on Gordon February 3, 1873, and told him about our matters with Hitchings & Brown, and asking him to endorse bank notes for us to the amount of $4,000. He said he was about embarking in the sandstone business, and he did not want to complicate himself with us or with any one else. He said he had some money that he did not want use just then, and he would loan us some and take our note. I told him the amount we needed to complete the payment of our note, and he let us have $2,500 and we gave our note for it. He called on us the same day afterward and told us he had been look-over his matters and could let us have $1,500 more. He gave us a check for it and we gave him our note for that too.

The notes for $2,500 and $1,500 were here produced and identified by the witness. The same were offered and received in evidence and read, as follows:

$2,500.] POTSDAM, N. Y., *February 8th*, 1873.

311 Two months after date I promised to pay to the order of S. B. Gordon twenty-five hundred dollars, at the National Bank of Potsdam, N. Y. Value received.

E. W. FOSTER.
H. WATKINS.

Marked Y.

(Endorsed on back:) S. B. GORDON.

Rec'd hereon as follows:

$400 of Mr. Watkins, April 15, '73.
$600 " " Foster, " 22, '73.
$1,000 " " " " 30, "

$700 " " " May 3d, "
$500 " " " " 9, "
$200 " " Watkins, " 9, "

The last two or 3 payments are on another note similar to this for $1,500.

1,500.] POTSDAM, *Feb. 8th*, 1873.

Two months after date we promise to pay to S. B. Gordon, or order, fifteen hundred dollars, at the National Bank Potsdam. Value received.

H. WATKINS.
E. W. FOSTER.

No. . Due . Marked Y1.

312 (Endorsed on back:) "This note is all paid except six hundred dollars and some interest.

"S. B. GORDON."

The witness further testified: The endorsements on these notes are in Gordon's handwriting.

(Witness shown check for $48.97, dated February 8th, 1873, and the witness testified:)

This is the check that we gave for the discount of the two notes. The endorsement is in Gordon's handwriting.

(The check was offered and received in evidence, and reads as follows:

"No. .] POTSDAM, N. Y., *Feb'y 8th*, 1873.

"The National Bank of Potsdam pay to S. B. Gordon, or bearer, forty-eight & $\frac{97}{100}$ dollars.

"$48.97.] E. W. FOSTER."

Marked Q.

The check dated April 16th, 1873, was endorsed by Gordon and was given as a payment on one of these notes, and also the check of May 9th, 1873. These notes have been fully paid; they were surrendered
313 by Gordon to Foster. I did not know that Gordon had borrowed any money of any one. I know that this money obtained from Gordon was used to pay the Montreal note. I had heard that Lanford had been offered $10,000 for his quarry and had refused it. It was sold in January, 1875, by the assignee in bankruptcy for $600. Gordon's stock has been transferred to other parties—some to his wife, some to his children, some to Cox, and $20,000 of it to Foster and myself for benefit of company. Gordon became bankrupt about 1st of January, 1874. Paddock did not take stock, as I understand, because he became embarrassed and failed.

The witness being cross-examined testified as follows:

I had been informed what became of the stock. I was president after Gordon went out. I think the transfer was signed by Gordon. I did not know Gordon wanted to raise money; he claimed that he had money enough to run the business, and that he only wanted to
314 sell small shares and keep the rest. Up to the failure of Hitch-

ings & Brown I did not need any endorsers. Foster and I were compelled to buy their property. I did not see Foster make the payments that he made on the notes; I made the payments myself that I have stated. When we applied to him for endorsements he stated that he was going into the sandstone business and did not wish to complicate himself, but had $2,500 he was not going to use for a couple of weeks; he said if it would be any accommodation he would let us have $1,500 more. He told us he would give us the check for $1,500. Gave him two notes, one $2,500, one $1,500. The notes have been fully paid and surrendered to Foster. Had no knowledge of time of these notes that Gordon had borrowed money of Butler or anybody.

EDWARD W. FOSTER being then sworn as a witness on behalf of the defendants testified as follows:

315 I have resided in Potsdam for 37 years. My business has been selling land and merchandise. I knew Gordon all the time I was there; his financial standing was alway' good up to the time of his failure, in December, 1872. I considered him worth from $30,000 to $50,000 in the fall of 1873. He spoke to me occasionally about taking stock in Potsdam Sandstone Co., but he had no definite conversation about it until November or December of that year. I have known of the quarries and had a personal, not pecuniary, interest in them for many years. I went with the State geologist up to look at them in 1841. I am not a geologist or an expert. I think the geologist was Mr. Emmons, but cannot say positively. We examined the Parmeter quarry. I formed an impression that the stone had peculiarities which made it very valuable. The Parmeter quarry was somewhat opened at that time. Since then I have been up and down by these quarries a great many times. I have noticed the stratification of each of

316 the quarries. I had formed an opinion of the stone on each of the lots; it was and is my opinion that there is a large quantity of valuable stone on each of the lots, except, possibly, the Hale lot, and also that the stone were equally good in the different quarries as to quality. There were buildings made of that stone in Potsdam when I came there. I had and still have a very exalted opinion of the stone as building stone. It was my opinion and belief in the fall of 1872 that it was practicable to market these stone. I thought that if they were once fairly known abroad they would recommend themselves. I had heard that they had been used with satisfaction in the parliament buildings at Ottawa, at the capitol in Albany, in Boston, and in Rome, and also some at Albany and Montreal in dwelling-houses, and all this increased the value of the stone in my eyes. I believed when I signed the certificate of value that the several lots named therein were

317 worth the sums stated. I fully believed all the statements contained in the certificate. The certificates and agreements were all signed the same day by me. Gordon had in the fall of 1872 expressed a desire to have an organization formed to develop the quarries, and had expressed a desire that I should become interested. He asked if I thought I was sufficiently acquainted with the quarries to judge of their value, and I told him I was. He then said that in order to perfect an organisation it would be necessary to have an apprisal of the value of the property, and asked me if I was willing to make one for the purpose of letting the value of the lots be known, as they seemed to me. I said I would for the purpose of aiding the organisation of the company. He also spoke to me about taking stock. I told that I would be very glad to do so, but that the Hitchings & Brown

failure gave us all that we could raise. He spoke of a note held
318 by us against Parmeter for $8,000, and I said that we had such notes. He said if we would let him have those notes they would be just the same to him as money; that he would take them the same as cash on sale of stock to us at 50 cents on the dollar. He said he could apply them on the amount due Parmeter for his quarry. I told him I would consent if Watkins would. Watkins and I told him that we ought to have the right to take double stock up to a certain time. Gordon drew an agreement which did not contain that clause, and we declined to sign. He said he would change the agreement, and did so the same day. There were three certificates signed and the agreements in regard to taking stock. We left the papers with Gordon.

I never intended to defraud Butler or any one else by these papers, or in any way. I had no knowledge or information that he was intending to use these papers to get money from Butler. The first in-
319 timation I had of it was from Watkins; he told me, in the latter part of 1873, that Gordon had used the certificates to procure a loan of $10,000 from Butler. I remember the interview at Canton, referred to by Mr. Butler; it was after I had received this information from Watkins. I went to Canton where the county clerk's office is to see what papers were on record in regard to the company, and if there were any liens on the property. The search had not been made when I saw Butler, but the same day Judge Sawyer made a search for me. I met Butler in the street in company with William C. Cook. Butler was a good deal excited and asked what was being done with Gordon, and what he was in jail for; he asked me to go up stairs in the hotel. I went with him, and we had some conversation. Butler inquired what Gordon was arrested for. I told him there were serious charges made against him, and I was afraid there was some truth in them.
320 Butler said Gordon had done business for him for a long time, and he had the utmost confidence in him, that he was well acquainted with Gordon's family, and felt interested in them, and hoped that he would go to work and get him out, and let him go to work again. He then inquired if Gordon had been prosperous in the business of the company. I told him I thought he had; he then asked me if I was interested in the company, and I told him that I was. He then said that he held a mortgage on the quarries, and wanted to know if the company would pay the interest on the bond. I told him that I did not know what to say, that we had known nothing in relation to the mortgage until within a few days, and that we had only learned it from Gordon quite recently that he had wronged us in putting the mortgage on the property, and using the certificate for other purposes than we had designed. He asked me if the property was good for the amount of the mortgage, and said the Orchard lot was not included in
321 it. I said the property was worth the amount of the mortgage, and a great deal more if it could only be developed; that was the substance of the conversation. He spoke of the contemplated marriage between my son and Gordon's daughter, and I said I supposed it was going to take place.

Watkins and I were endorsers for Hitchings & Brown on a $10,000 gold note at Montreal, and in February we found that we had got to borrow some money to pay it. We thought that we could get the money at the bank in Potsdam, and we spoke of getting somebody to endorse. Watkins thought Gordon would, and he left my office, and soon came back; he told me that Gordon declined to endorse, but that he had some money that he would lend us for a couple of months, and we bor-

rowed it; the $2,500 was placed to my credit in the bank; that was not all we wanted. We wanted to raise $1,500 more. Watkins told me the same day Gordon would let us have that. We got a check for
322 $1,500 from him, and gave our note for that amount. I used this money to buy gold for the Montreal note. The check of Feb. 8th was given by me to pay discount for the note; this check of $48.97 was charged to me at the bank. These notes have been fully paid. I do not know personally that Watkins made the two payments he says he made.

(This witness here identified checks of $600, $1,000, $700, and says that they were checks that he gave to Gordon to apply in payment of those notes, and that these checks were paid at the bank).

The checks were offered and received in evidence, and are as follows:

"No.]. POTSDAM, N. Y., *May 3d*, 1873.

The National Bank of Potsdam pay to S. B. Gordon or bearer seven hundred dollars.

$700.00]. E. W. FOSTER.

[2 cent rev. stamp cancelled].

"No.]. POTSDAM, N. Y., *April* 29, 1873.

The Nation' Bank of Potsdam pay to S. B. Gordon or bearer
323 one thousand dollars.

$1,000.00]. E. W. FOSTER.

[2-cent rev. stamp cancelled].

No. .] POTSDAM, N. Y., *April* 22, 1873.

The National Bank of Potsdam pay to S. B. Gordon, or order, six hundred dollars.

$600.] E. W. FOSTER.

[Two cent rev. stamp cancelled.]

(Endorsed on back:)

S. B. GORDON.

The witness further testified:

The balance up to $3,900 was paid in money. Gordon had assumed a note that I held against Stephen Cary for $211. The note was perfectly good; he assumed it because it was due. I took the note from the bank and held it. The $500 without date was paid by check or in money. Gordon owed me a note of forty-four dollars. The notes of $211 and $44 were identified by the witness, and offered and received in evidence, and read as follows:

$211.$\frac{94}{100}$.] POTSDAM, N. Y., *Aug.* 8, 1871.

324 One year after date we, jointly and severally, promise to pay J. B. Austin, or order, two hundred eleven & $\frac{94}{100}$ dollars, at the National Bank of Potsdam, value received with interest.

STEPHEN A. CRARY.
AUSTIN C. LEONARD.

[10 cent rev. stamp cancelled.] [5 cent rev. stamp cancelled.]

(Endorsed on back:) Aug. 11. Stephen A. Crary, A. C. Leonard. $226.90; pro,. 90. J. B. Austin.

$44.78.] POTSDAM, N. Y., *Nov.* 26, 1872.

Two months after date I promise to pay to E. W. Foster, or order, forty-four and $\frac{78}{100}$ dollars, at the National Bank of Potsdam, N. Y.; value received.

S. B. GORDON.

(Endorsed on back:) S. B. Gordon. Nov. 6, 1872. $44.78.

Holding these notes I told Gordon that I wanted to settle. It was agreed between him and me that the balance on the $4,000 notes should apply to these two notes; these two notes overpaid that balance,
325 and the difference has never been paid to me. I think that the endorsements on the $4,000 notes had been made when I called upon him for the notes; those endorsements may have been made at the same time. I think I took them up in the summer of 1873, and have had them ever since. I went to him twice to settle. I claimed $500 more was paid than he could find. The check of $500 of February 4th was not connected with Foster & Watkins' business. It was paid on land account for which I was agent, and neither I nor Watkins had any interest in the money. I delivered to Gordon the Parmeter notes and subsequently received certificates of stock.

The certificate of organization of the Potsdam Sandstone Company was here offered and received in evidence, it reads as follows:

STATE OF NEW YORK,
County of St. Lawrence, Town of Potsdam, ss:

We, De Marquis Parmeter, Samuel B. Gordon, Henry Watkins, Edward W. Foster, and Charles Cox, do hereby certify that we de-
326 sire to form a company pursuant to the provisions of an act entitled "An act to authorise the formation of corporations for mining, mechanical or chemical purposes," passed February 17, 1848, and of the several acts extending and amending said act. That the corporate name of said company is to be Potsdam Sandstone Company, and the object for which such company is to be formed is the carrying on the business of quarrying stone. That the amount of the capital stock of said company is to be one hundred and fifty thousand dollars. That the number of shares of which the said stock is to consist is to be fifteen hundred. That the term of existence of said company is to be twenty years. The number of trustees who shall manage the concerns of said company shall be five, and that the names of such trustees for the first year are De Marquis Parmeter, Samuel B. Gordon, Henry Watkins, Edward W. Foster, Charles Cox. And the name of the
327 town and county in which the operations of said company are to be carried on, is the town of Potsdam in the county of St. Lawrence in the State of New York.

DE MARQUIS PARMETER.
S. B. GORDON.
H. WATKINS.
CHARLES COX.

STATE OF NEW YORK,
County of St. Lawrence, Town of Potsdam, ss:

On the 31st day of March, A. D. 1873, before me personally appeared De Marquis Parmeter, Samuel B. Gordon, Edward W. Foster, Henry Watkins, and Charles Cox, to me personally known to be the same in-

dividuals described in, and who executed the foregoing instrument, & severally acknowledged that they executed the same.

HENRY P. FOSTER,
Notary Public.

STATE OF NEW YORK,
St. Lawrence County, Clerk's Office:

SEAL OF ST. LAWRENCE CO. I have compared the foregoing copy with the original certificate filed Nov. 10, 1873,
328 in this office, and I certify that it is a true and correct copy of the same, and of the whole thereof.

In witness whereof I have hereunto set my hand and seal of office, at Canton, this 5th day of May, 1874.

T. H. FERRIS, *Clerk.*

The certificates we received are these:

The certificates of stock were here offered and received in evidence, and are as follows:

H. P. FOSTER, *Secretary.* S. B. GORDON, *President.* I. P. HUNT, *Superintendent.*

OFFICE OF THE POTSDAM SANDSTONE COMPANY,
Potsdam, N. Y., Nov. 25, 1873.

No. 5.] [15 shares.

This certificate that Edward W. Foster, of Potsdam, N. Y., is entitled to fifteen shares in the capital stock of the Potsdam Sandstone Company, incorporated under the laws of the State of New York; that said shares shall be transferable on the books of the company only in person, or by attorneys, on surrender of this scrip, full payment
329 of all calls and assessments due hereon having been made.

In witness whereof the said company has caused this certificate to be signed by its president and secretary, at the office of the company, at the village of Potsdam, this twenty-fifth day of November, 1873; said shares are full stock and not liable to any further calls:

S. B. GORDON,
President.

HENRY P. FOSTER, *Secretary.*

H. P. FOSTER, *Secretary.* S. B. GORDON, *President.* I. P. HUNT, *Superintendent.*

OFFICE OF THE POTSDAM SANDSTONE COMPANY,
Potsdam, N. Y. Nov. 25, 1873.

No. 9.] [15 shares.

This certifies that Edward W. Foster, of Potsdam, N. Y., is entitled to fifteen shares in the capital stock of the Potsdam Sandstone Company, incorporated under the laws of the State of New York; that said shares shall be transferable on the books of the company only in person, or by attorney, on surrender of this scrip.

330 In witness whereof the said company has caused this certificate to be signed by its president and secretary, at the office of the company, at the village of Potsdam, this twenty-fifth day of November, 1873, said shares are full stock and not liable to any further calls.

S. B. GORDON,
President.

HENRY P. FOSTER, *Secretary.*

H. P. FOSTER, *Secretary.* S. B. GORDON, *President.* I. P. HUNT, *Superintendent.*

OFFICE OF THE POTSDAM SANDSTONE COMPANY,
Potsdam, N. Y., Nov. 25, 1873.

No. 6.] [15 shares.

This certifies that Henry Watkins, of Potsdam, N. Y., is entitled to fifteen shares in the capital stock of the Potsdam Sandstone Company, incorporated under the laws of the State of New York; that said shares shall be transferable on the book of the company only in person, or by attorney, on surrender of this scrip, full payment of all calls and assessments due hereon having been made.

331 In witness whereof the said company has caused this certificate to be to be signed by its president and secretary, at the office of the company at the village of Potsdam, this twenty-fifth day of November, 1873. Said shares are full stock, and not liable to any further calls.

S. B. GORDON, *President.*

H. P. FOSTER, *Secretary.*

H. P. FOSTER, *Secretary.* S. B. GORDON, *President.* I. P. HUNT, *Superintendent.*

OFFICE OF THE POTSDAM SANDSTONE COMPANY,
Potsdam, N. Y., Nov. 25, 1873.

No. 10.] 15 shares.]

This certifies that Henry Watkins, of Potsdam, N. Y., is entitled to fifteen shares in the capital stock of the Potsdam Sandstone Company, incorporated under the laws of the State of New York. That said shares shall be transferable on the books of the company only in person, or by attorney, on surrender of this scrip.

In witness whereof the said company has caused this certificate to be signed by its president and secretary, at the office of the
332 company at the village of Potsdam, this twenty-fifth day of November, 1873. Said shares are full stock, and not liable to any further calls.

S. B. GORDON, *President.*

HENRY P. FOSTER, *Secretary.*

After Gordon's failure I borrowed the Parmeters notes of him to make copies. I sent them back to Gordon, and have never seen them since.

These lots have always been designated as quarry lots.

At the time we borrowed the $4,000 I did not know that Gordon had made a loan from Butler or any one else.

The witness being cross-examined, testified as follows:

The reason I did not surrender the two notes to Gordon was because he had not paid up the balance. It was after Gordon's arrest that I borrowed the Parmeter notes. I received these notes from Hitchings & Brown in 1870. There was an assignment of Hitchings and Brown
to us. These notes were turned out as collateral security to us.
333 Watkins & I commenced at that time endorsing for them. I think I had endorsed for them two or three years before. The Montreal note was a four-months' note, made in October, 1872. We were the first endorsers on the note. Hitchings and Brown failed De-

cember 4, 1872, before the certificate was signed. We knew before we signed certificate that we had got to provide for the $10,000 gold note. Watkins and Foster were first endorsers on that note.

Gordon told me and Watkins that he had plenty of money until he could realize from sale of stone. I had perfect confidence in the success of the company. Gordon claimed the quarry property to be worth $100,000. I had conversations with Gordon the latter part of 1872. Watkins and I went into possession of the store property of Hitchings & Brown. We had our endorsements for them to pay, and I supposed we owned the Parmeter notes. We had other security, but were heavy losers. We were on about $30,000 of their paper. I am 58 years
334 old. Emmons and I did not examine the quarries all day. I was there by the quarries frequently after that, especially from 1870 to 1872. I was engaged as mill owner in driving logs past the quarries every spring. I had not formed a specific opinion as to the precise value until I was asked by Gordon to make one.

Ques. How came you to form the same opinion of the value of these quarries and estimate them severally at the same sums the day the certificate was signed as Gordon had previously estimated them in the statement he had previously sent Butler?

Ans. I can't tell. I was not guided by any one in making that. If the quarries had been my own I should have fixed their value higher. My judgment is that the Falls lot is the best on the river. In regard to the Cox lot I was perhaps somewhat influenced by what Ben. Cox told me about it. My son made these copies of the Parmeter notes. He acted as secretary of the company. He commenced in 1873,
335 and is the son-in-law of Gordon.

The copies of the notes were here produced and identified by the witness, and offered and received in evidence, and read as follows:

$2,000.00.] POTSDAM, *June* 24, 1869.

Four months after date I promise to pay to the order of Brookins & Brown two thousand dollars, value received, at Nat. Bank of Potsdam.

(Signed) D. PARMETER.

Endorsed by BROOKINS & BROWN.
" " HITCHINGS & BROWN.

[One dollar revenue stamp.]

Word "copy" written across in carmine ink.

$1,000.] POTSDAM, *June* 24, 1869.

Three months after date I promise to pay to the order of Brooklins & Brown one thousand dollars, value received, at Jefferson Co. Nat. Bank.

(Signed) D. PARMETER.
HITCHING & BROWN.

[Fifty cent revenue stamp.]

Word "copy" written across in carmine ink.

336 These Parmeter notes remained in our possession from October, 1870, until given to Gordon, in 1873. Parmeter told me that he would pay the principal of those notes; he told me they ought not have been given, but that if we would take them he would pay the

principal; he never told me that he would not pay them; I wanted the copies of the notes for settlement of the Hitchings and Brown matters. The settlement is not completed yet. Up to the time that Gordon went to jail I had invested no money; nothing except these notes; I knew of their working the Cox quarry in 1873; I understood they lost money in uncapping at that time. The stone in the Rainor Block, in Boston, went there in 1874, after Gordon had ceased to act in the concern. Cox, Foster and Watkins were the company at that time; Foster, Watkins, Cox and Parmeter are what are left of the company. I have put in money since the spring of 1874; I have a land-book and bank-book at home; I think the five hundred dollars was paid for
337 either Leonard or Daniels; Daniels had contract a good many years ago.

(The plaintiff's counsel offered to show by witness that he had, since the commencement of this suit, procured his cousin to record a mortgage for $10,000, which he had for several years unrecorded, given by witness to his cousin on his homestead in Potsdam.

The defendants' counsel objected, and the court held that if the plaintiff's counsel could show the witness procured it to be recorded, they might show it.)

Witness answered: Did not advise my cousin to get the mortgage recorded; the recording has not been charged to me; I have not paid it. I did not intimate to him that he had better have it recorded. Heard it was recorded about two years ago; do not know why the certificate and argument bear different dates; my impression is that there were three certificates, but won't swear positively there were more than one. My talks with Gordon were in his office and mine. I did express confidence to him in that quarry property; after those talks the certificates were brought, written as they are. I do not remember whether the
338 valuations were all carried out at the time they were brought here. I think that I made pencil memoranda on another paper, which were not preserved; 19 A was brought to me just as it is, and I signed it. Can't say what time of day the paper was signed; never do business at my house; that paper was signed either at Gordon's office or at my office. Paddock failed in the summer or fall of 1873. The stone used in the Capitol at Albany were binding-stone, and do not appear in sight. I presume I saw notice of foreclosure sale; I did not attend, because I did not propose to recognize in any way that I had committed a fraud on Butler. I did not tell De Marquis Parmeter in January, 1875, not to say anything about the note business, nor did I ever say so. The Parmeter notes are not outlawed. I did not sign these certificates to procure a loan of Butler; I should have signed the apprisal if I had known he so intended to use it, and don't know as I should have changed the phraseology of it.

339 The witness on redirect examination testified as follows:

Foster and Watkins suffered a loss of over $20,000, over and above all securities from Hitchings & Brown. Parmeter told me before we let Gordon have the notes that if we let Gordon have them it would be a good way to get them paid. He said he was willing I should let Gordon have them to apply on the last payment due from Gordon to him. There was never a dollar of profit divided from the sandstone business. When Gordon went out he left debts of the company amounting to about $7,000; before that time he received and paid out all the money. He was financial manager as long as he was connected with the concern. Whatever has been made since he went out has been applied to the payment of those debts. When Gordon failed and owed a

note of $5,000 to the plaintiff, signed by Cox, Watkins and Foster, which note has since been paid, the money to pay it was borrowed of the Potsdam Bank. This $5,000 was had in the fall of 1873, about the month of November, 1873. Thirty thousand dollars were due
340 in 1874 of the Rainar job. That money went to pay debts, wages, and expenses.

HENRY P. FOSTER, being duly sworn as a witness for the defendants, testified as follows:

I reside at Potsdam, and am the son of the defendant Foster. I remember, while Gordon was in jail, going out to Canton and getting the Parmeter notes from him and carrying them back to Potsdam. I copied the notes, and in a short time Gordon was released; I gave him the notes and have never seen them since.

The witness being cross-examined testified as follows:

It was in January, 1874, that I went to Canton; I found him in a room by himself on the second tier; he had some boxes of paper with him. I told him I wanted to take the Parmeter notes to copy. I was then engaged to his daughter and have since married her. I took the notes back to Potsdam, copied them and compared them, and when he came back to Potsdam I gave them to him in his office.

341 DE MARQUIS PARMETER was then sworn as a witness for the defendants, and testified as follows:

I am 62 years of age and reside in Potsdam. The Parmeter notes spoken of were given in settlement of Brookins & Brown claim against me. I think I told Foster they were good for their face, but I would not pay any interest, as I ought not to have given the notes in 1872. Gordon owed me on the purchase of the Parmeter quarry $5,000 or $6,000. I told him if he would get these notes I would allow him the face of them on the purchase.

Witness, being cross-examined by plaintiff's counsel, said:

I have never paid anything on these notes. I sold quarry to Gordon in 1870 or 1871. I took articles of agreement. I deeded to him for specific purpose. He gave me a mortgage back for $3,500. I took that and got the money on it. I considered I did not sell the quarry to Gordon.

On being further examined by defendants' counsel the witness said:

342 The full purchase price was $12,000. There was a mortgage of $2,500 to the St. Lawrence University.

Copy deed Parmeter to Gordon, dated March 28, 1872, offered in evidence, marked B 1, and reads as follows:

This indenture, made this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and seventy-two, between De Marquis Parmeter, of Potsdam, St. Lawrence County, New York, and Mary Jane, his wife, on the first part, and Samuel B. Gordon, of Potsdam aforesaid, of the second part, witnesseth: That the said party of the first part, in consideration of the sum of six thousand dollars to them duly paid, have sold, and by these presents do grant and convey, to the said party of the second part, his heirs and assigns, all that certain lot, piece, or parcel of land situate, lying, and being in said town of Potsdam, being part of great lots distinguished on the proprietor's map by the number seventy-six (76) and seventy-seven (77),

and bounded as follows: Beginning on the easterly bank or
343 shore of Racket River, at the southerly corner of a lot containing 78 acres, heretofore conveyed by the proprietors to one Timothy Pierce, a birch tree, cornered, and running thence north 61 degrees 30 minutes east along the southerly line of said Pierce lot, twenty-eight (28) chains and ninety-six (96) links, to the middle of a certain road or highway; thence southerly along the middle of said road, twenty-four (24) chains and sixty-four (64) links, to the northerly line of the lot of forty-four acres, or thereabouts, first described in the deed from Issa'c Mathews & wife to said De Marquis, bearing date March 7th, 1857, and recorded in the clerk's office of said county on the 13th day of March, 1857, in liber 58 C, of deeds, at page 587, &c., thence south 61 degrees 30 minutes west along said northerly line, forty-one (41) chains and thirty-five links, to the easterly shore of the bank of said river, a stake six links north of a s'rub tree; thence down along said easterly bank or shore to the place of beginning, containing seventy-five
344 & $\frac{25}{100}$ ($75\frac{25}{100}$) acres of land, be the same more or less; expressly excepting and reserving, however, from the premises above described that portion thereof heretofore conveyed by said parties of the first part Edward W. Foster, by deed recorded in the clerk's office of said county; but not excepting from the grant and conveyance hereby made, but expressly including therein, all rights, privileges, and easements to and in all the said lands above described, reserving in or excepted from said conveyance to said Foster; also all that certain other piece of land situate in Potsdam aforesaid, being part of mile square lot No. 76, and bounded thus: Beginning at a point at low-water mark in the westerly bank or shore of Racket River, the northeast corner of the Hale lot, so-called, being the lot of about nine & $\frac{45}{100}$ acres of land conveyed by Zenas Clark and wife in their lifetime to the heirs of Erastus Hale, and running thence westerly along the northerly bounds of said Hale lot, eight chains and twenty links, to the middle of the road or highway leading from Potsdam Village to Colton, on the west of Racket River; thence northerly along the middle of said road, fourteen chains, to the southeasterly corner of the James "Train"
345 lot of about 26 $\frac{43}{100}$ acres, now owned by said Samuel B. Gordon; thence easterly along the southerly bounds of said Train lot, twelve chains and ninety links, to the southeasterly corner thereof, a point at low water-mark in the westerly shore of said river; thence up along the westerly shore of said river to the place of beginning, containing seventeen acres of land, be the same more or less, being the old Parmeter stone quarry lot, together with the right of way across said Hale lot, and all other rights & easements in said Hale lot owned by said parties of the first part, or to which th'y are entitled, with the appurtenances and all the estate, title, and interest therein of the said party of the first part; and the said De Marquis Parmeter doth hereby covenant and agree to and with the said party of the second, his heirs and assigns, that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, he will forever warrant and defend against any person
346 whomsoever lawfully claiming the same or any part thereof, except a mortgage of said last-described premises for $2,500, and interest.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

D. PARMETER. [L. S.]
MARY J. PARMETER. [L. S.]

Sealed and delivered in the presence of—

In 21 line, 1st page, "and running" interlined.
In 11 line, 2 page, "at low-water mark."
" 18 " " " "fourteen chains."
" 20 " " " "twelve chains & nin'ty links."
" 21 " " " "at low-water mark."
" 24 " " " nearly a whole line.
" 34 " " " " " " "
All before signing.

M. BROWN.

STATE OF NEW YORK,
St. Lawrence County, ss:

On this twenty-eight' day of March, in the year one thousand eight hundred and seventy-two, before me appeared De Marquis Par-
347 meter and Mary Jane, his wife, to me personally known to be the same persons described in and who executed the foregoing instrument, who severally acknowledged that they executed the same; and the said Mary Jane, in a private examination by me apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

MILTON BROWN,
Notary Public.

STATE OF NEW YORK,
St. Lawrence County, Clerk' Office:

I have compared the foregoing copy with the original deed on record in this office, and I certify that it is a true and correct copy of the same and of the whole thereof.

In witness whereof I have hereunto set my hand and seal of office, at Canton, this 15th day of March, 1877.

[ST. LAWRENCE COUNTY SEAL.] MURRY N. RALPH, *Clerk.*

After giving the deed, sometime in 1872, I told Gordon he could use these Parmeter notes on the last payment.

348 On being further cross-examined by plaintiff's counsel witness said:

The deed was made to Gordon and mortgage taken back by me to enable me to raise the money. I consider I own the property. I never sold it. I had a contract whereby Gordon was to pay me $12,000. It was made before the deed. The deed was given in pursuance of that agreement. I don't know but I have said I wouldn't pay these Parmeter notes. I have said I ought not to pay them. What I told Gordon was that I would take these notes on the last payment of that contract. Have had nothing to do with running quarry since Foster, Watkins and Cox had them.

The defendants here offered the deposition of Samuel B. Gordon, taken upon commission, which was read in evidence; both parties mutually agree that the same might be read, waiving all objections contained in the deposition on either side. It reads as follows:

349 SAMUEL B. GORDON, being duly sworn and examined at the instance of the defendants, testified as follows:

By Mr. RUSSEL:

Q. What is your name?
A. Samuel B. Gordon.

Q. Your age?
A. 54.
Q. Your occupation?
A. A lawyer.
Q. Your residence?
St. Louis.
Q. Is this your permanent residence?
A. Yes, sir.
Q. How long have you resided in St. Louis?
A. About fifteen months—sixteen months.
Q. Prior to that time where did you reside?
A. Potsdam, St. Lawrence Co., N. Y.
Q. What was your occupation there?
A. A lawyer, and was also engaged in general business of some other kind.
Q. For how many years were you a practicing lawyer in the State of New York?
A. From the first of January, 1857, till the time I left there, October, 1875.
Q. Are you a married man?
A. Yes, sir.
Question. Have you a wife and children?
A. Yes, sir.
Q. How long have you known the plaintiff, John G. Butler?
A. I should say about fifteen years.
Q. When did you first commence transacting business for him?
350 A. Well, think it was about 1862 or 1863, I should think.
Q. What was his business at that time?
A. He was a wholesale liquor-dealer in New York City.
Q. And what kind of business did he have for you to transact?
A. Making collections for him and his house—his firm. I think that was the first.
Q. How long did you continue to act as attorney for him?
Well, from the time I first began, which I am not able to fix any more definitely than I have—somewhere along from 1860 to 1865, I should think, down to about the first of January, 1874.
Q. On the first day of January, 1874, did you have pending business for him unfinished?
A. I did.
Q. During that period of time that you have narrated what other business did you transact for him than making collections?
A. I loaned money for him on bond & mortgage; some on note.
Q. In what counties?
A. I think in St. Lawrence County only, if I recollect right.
351 Q. How frequent was that sort of business?
A. Well, I could hardly tell you. In the course of the last two or three or four years to the 1st of January, 1874, I suppose I must have made a dozen loans. I should say perhaps from eight to twelve loans as near as I can recollect.
Q. Was there any one else in St. Lawrence County to look after his interests besides yourself, that you know of?
A. I think there was.
Q. Who?
A. I think William C. Cook, esq., a lawyer. Canton also did some business for him.
Q. From the time of your first commencing to do business for him

until about the first day of November, 1873, what were your terms of intimacy, social and otherwise?

A. Well, we were on terms of intimacy; we were personal friends.

Q. Was it more strong during the latter part of the time named?

A. Yes, sir.

Q. During what time was there any proposition or suggestion from him as to you and he engaging in business jointly together?

A. I think there was.

Q. As to what business?

352 By Mr. PARKER. Was this in writing—written communication?

A. Both ways. A portion of our negotiations in regard to it was in correspondence, and I think part was oral. I may be mistaken about any of it having been oral. That is my present recollection. A. I would not undertake to say positively that any portion of it was by oral communication, but my impression is there was some portion of it.

Q. (By the defendants' counsel.) What was that oral negotiation or suggestion, according to the best of your recollection; the substance of it?

A. It was the same as the written part.

Q. We have no written part before us. Give us the substance of it, according to your recollection.

A. I am unable to distinguish between that which was written and that which was oral, if there was any oral.

Q. Give us your best recollection on the subject.

A. Mr. Butler proposed to establish a bank at Potsdam; he and his partner, Mr. Dunklee.

Q. I am asking your best recollection.

A. I am giving it to you.

353 Q. Mr. Butler & Mr. Dunklee proposed to establish a bank at Potsdam—go on.

A. That is all I can remember.

Q. What connection were you to have with it?

A. I was to engage in it with them.

Q. Who was to be the manager at Potsdam?

A. I think I was. I was to have the management of the bank if one was established. Perhaps I should say I was to be one of the managers.

Q. About what time was this in regard to the bank?

A. Well, I should say it was about 1871; perhaps 1872. It was from 1870 to 1872, I should say.

Q. Was there any other negotiation as to your buying out their liquor business?

A. There was.

Q. Did you ever have any conversation or oral negotiation with Mr. Butler in regard to the sandstone business at Potsdam?

A. I did.

Q. When was the first conversation, as near as you can recollect?

A. I should say from 1868, perhaps 1865, as early as that, down to the first of January, 1874.

354 Q. What statement did you make to him in regard to your interest in the sandstone business—I mean oral statement—prior to 1872; what statement did you make to him?

A. What statement did I make to him?

Q. Yes. What information did you give him?

A. I think you will have to point your question a little more. I tol

him about the quarries, if that is what your question is aimed to elicit. I told him about the quarries, my interest in them, and my views in regard to their profitableness if properly worked, and my own purposes in connection with them; and still I am only summarizing years of talk at intervals.

Q. What did you say to him in regard to your interest in them?

A. The interest I felt in their developement or my pecuniary interest in them?

Q. Both.

A. In regard to my interest in their development, I had a very high opinion of their value and of their profitableness if properly worked. I told him I had been buying more or less of them for, I think, 12 or 15 years.

Q. And in regard to your pecuniary interest in them; what
355 you were intending to do with them?

A. I intended to work them if I could bring about a proper arrangement in regard to it.

Q. Did you make any proposition to him in regard to interesting himself in them?

A. I did.

Q. What was it?

A. Well, I proposed to him that he should take an interest in them.

Q. Of what kind?

A. A part owner—that is, I think the proposition was made both ways; that we should work them individually or establish a company, and he to be a stockholder; also, that he should loan some money upon them. All of those three propositions were made to him and talked over with him.

Q. What interest did he take in your developing these quarries?

A. Well, he took an interest; at least, I should so judge that he took an interest.

Q. What did he say in regard to it?

A. I could not give his words.

Q. Give me the substance.

A. The substance was that he felt an interest in the quarries, and would like to see them developed; and he seemed to participate
356 in my views in regard to them, and I thought also that he took an interest in them from an interest in me personally.

Ques. What did he say about having an interest in you personally and in your welfare, if anything?

Ans. Well, I think that he either directly or indirectly gave me to understand that he felt an interest in my personal welfare.

Q. Give the substance of what he said.

Ans. I have.

Quest. You have expressed it in such phraseol'y that it don't seem to give the substance. I don't ask for details, or of one hundred conversations upon it. Simply the substance of what he said about desiring to help you, and feeling an interest in your welfare, and in developing the quarries?

Ans. He said he felt an interest in the quarries, and in their development, and desi*d*ed to aid me in doing it.

Q. How long had you been interested in those quarries prior to 1872?

Ans. I think, about 18 years; that is, in some of them.

357 Ques. In the summer of 1873 did Mr. Butler loan to you $5,000 upon your individual note, without any security?

Ans. He did.

Ques. What security did you offer him?

Ans. I don't remember that *if* offered him any.

Ques. Any sandstone stock?

Ans. I don't know that I did.

Ques. You don't remember?

Ans. I don't remember.

Ques. Where was that loan made?

Ans. Made at his office in the city of New York.

Ques. The day before that loan was made did you see him anywhere, you and your wife?

Ans. I think so.

Ques. Where did you see him? Did he go anywhere with you?

Ans. I could not say. About that time, either that day or the day before, we were riding in Central Park. He took his own horse and carriage.

Ques. In the evening?

Ans. In the evening; my impression is we went to some place of amusement—I think the theatre—together. I remember riding
358 in the park and attending the theatre. I have been with him a number of times. I can't recall whether it was that particular time or not. My impression is we did—that is the best of my recollection—that we did go to the theatre together one of those nights. There were several members of my family there.

Ques. On or about the fore part of September did he loan to you a further sum?

Ans. He did.

Ques. How much?

Ans. $5,000.

Ques. Upon your note?

Ans. With others.

Ques. State whether, during the time from 1865 up to the first of January, 1872, Mr. Butler was familiar with your business and property generally. I only ask you to state what you know of Mr. Butler's knowledge upon the subject.

Ans. He knew considerable about my business; its general features and somewhat of details.

Ques. And your property?

Ans. Yes, sir.

Ques. What was the source of his knowledge?

Ans. Personal conversation with each other, for one thing.
359 Sometimes my showing him my property; I think I showed him some personally.

Ques. During those years from 1865 to the first of January, 1873, state whether those conversations grew more frequent or the reverse.

Ans. They did grow more frequent.

Ques. During that time did you and he have any differences?

A. No; not that I am aware of.

Q. About how often did you see each other personally?

A. About three or four times a year.

Q. And how long were those intervals generally?

A. They would vary; sometimes a day or two, sometimes a week or two.

Q. In intrusting money for you to loan, how did he usually do it; how did he entrust money for you to loan, if at all?

A. Parties owning lands wanting to borrow money made application to me, and I made examination of their security, wrote to Mr. Butler

the substance of their application and details of the application, my description of the security, and my opinion in regard to it, and the advisability of making the loan; if he had the money to spare; or
360 chose to make the loan, he would write to me or tell me, as the case might be, if I happened to see him, and I made out the necessary papers; it was bond and mortgage most always. I looked up the title, had it certified by the proper officers, and forwarded him the papers. Sometimes he would forward me the money before and sometimes after the papers were forwarded to him. Sometimes it became necessary to use the money in paying off prior liens—that was the object sometimes—to consolidate debts resting on property. That is the general outline.

Q. Did you at any time give him any bond to secure him for the faithful performance of your duty in that respect?

A. No.

Q. Any security whatever?

A. None at all. Nothing of the kind.

Q. Did you at any time collect interest on his mortgages for him or the principal?

A. I did both.

Q. And remitted to him how?

A. By New York check or draft.

Q. Whose check?

361 A. Sometimes my own, sometimes a bank check; I think more usually my own check. I kept an account in New York.

Q. Your own individual check?

A. Yes, sir.

Q. Was any objection ever made by him to that manner of remitting?

A. Not that I am aware of, except I think I once overdrew my account, and the check was not paid; he wrote me and sent me the check. It was some small sum, however; less than $200; I made my account good and restur'ed him my check. That is the only objection I think he ever made. The over-draft resulted from deposit I had made not being credited; some remittance I had made to the bank was not credited.

Qu. State whether Mr. Butler ever advised you in regard to the way to conduct your business.

A. He did.

Q. You refer to the sandstone business, I suppose?

A. I refer to that.

Q. Anything else?

A. I think he did.

Q. What other business?

A. He advised me very generally in regard to business matters generally.

362 Q. (By counsel for the plaintiff.) Orally or by letter?

A. Orally; along about 1865; and 1866—I think 1866; I guess it was about 1866 and 1867.

Q. (By counsel for the defendant.) And later?

A. Later than that, I don't now remember of his advising me anything except in regard to this sandstone matter.

Q. (By counsel for plaintiff.) Was that oral?

A. Yes, sir; I think so; still of course I can only give my recollection; I can hardly distinguish between what was oral and what was in

writing. At this length of time I give my best recollection in regard to it.

Q. (By counsel for defendants.) Have you endeavored to give in answer to my questions oral conversations and negotiations; and, if so, how far have you given such oral conversations and negotiations?

A. I have, according to the best of my recollection.

Q. In January, 1873, you obtained the loan of $10,000 from Mr. Butler?

A. I did. I presume it was about that time. Yes; January, 1873.

363 Q. Bond & mortgage?

A. Yes, sir.

Q. Was the negotiation for that loan and its consummation entirely by correspondence between you and him?

A. I think it was. I have no recollection of any oral communication in regard to it.

Q. Did you see him from the time you first wrote about the loan until after it was consummated?

A. I think not.

Q. To whom did you apply for an appraisal of the value of the property on which the loan was made?

A. Edward W. Foster & Henry Watkins.

Q. Did you give them any information that you were applying for a loan from the plaintiff?

A. I did not.

Q. Did they learn from you at any time before the loan was actually made that the appraisal was to be used to obtain a loan from the plaintiff?

A. They did not.

Q. At the time you made the loan from the plaintiff what were you proposing to do with the money?

A. To develope the quarries we had been talking about.

Q. When you speak of quarries do you mean the quarries
364 named in the certificate of appraisal?

A. Yes, sir.

Q. Were those quarries named in the certificate the only quarries actually owned by you without incumbrance?

A. No, I think not. I owned several beside those.

Q. Beside those named in the certificate?

A. Yes, sir.

Q. I don't mean the ones upon which the mortgage was actually made.

A. I don't remember what the certificate contained; I thought that it had reference to these quarries which the mortgage covered.

(Defendants' counsel shows to the witness a copy of the certificate of appraisal as filed in the office of the clerk of the United States circuit court at Utica.)

Witness continued: I see the certificate embraces all the quarries on the west side of the river. What is your question?

Q. The question is, did you own any other quarries than those named in the certificate of appraisal?

A. I think I did.

Q. How many?

A. Two.

Q. By what names were they designated?

A. One was called—I don't know it by any particular name;

365 they were both on the easterly side of the river; one was the northerly one of the quarries, and the other was nearly the southerly one of the line of quarries.

Q. The quarries named in the certificate were on the westerly side of the river?

A. Yes, sir; the southerly one was called the Pierrepont quarry.

Q. Were those on the easterly side of the river encumbered?

A. As to the northerly one I could hardly tell you; I have most forgotten; it was an unimportant quarry. The southerly one was on a contract to be purchased from the town proprietor, Pierrepont.

Q. The northerly one was on unimportant quarry, and the southerly one was on a contract to purchase?

A. Yes, sir; $500 or $600 encumbrance upon it; it was all paid but that.

Q. Had any of the quarries on the westerly side named in the certificate of appraisal been developed at all at the time the certificate was made?

A. They had.

Q. Which ones?

A. Do you mean I should give the list?

Q. I should like you to do that.

366 A. The southerly one—in the list—the Falls lot, that had been developed a little, not a great deal. I had spent a little money on it myself, and I think others had before me, the former owners, but not a great deal. The second one was the Orchard lot. I think the former owner had dug some stone from that himself—Mr. Gardnir Cox—I think; that is only he'resay.

Q. Did it show any evidence of having been worked?

A. I think it did. The next one was the Ben. Cox quarry; that had been developed considerably. There had been a great deal of stone taken out of that; I should think for 30 or 40 years. The next one was the Hicks lot; that had also been worked more or less for a great many years—more formerly than latterly. The next was the Meacham lot; that had been worked some, as I understand, by the former owners, and when I owned it in connection with Meacham we also spent some money on it by ourselves in getting out stone. You want that

367 I I should go through the list below? The next was the Hale lot, but there was no quarry there of any consequence, it was a sort of valley. The next below was the Parmeter lot.

Q. Those are named in the certificate?

A. Yes, sir; that had been worked for 50 or 60 years, or 70 years. A good deal of stone had been taken out. The next one below that was called the Post lot; that had been worked some, but not much I think. I think I never had, up to that time, worked it at all; I did after that, but not before. I believe that completes the list.

Q. Of those quarry lots, had any of them been worked to exhaust the stone?

A. No, sir.

Q. What was the nature and kind of stone taken out from them—that they produced?

A. It was reddish sandstone you have heard of.

Q. What are they known as?

A. Potsdam sandstone. They are known by that in the books, and the stone is known as that.

Q. In what manner did it come out?

A. It came out usually in large sheets, which were piled upon each

other, varying in thickness from half an inch to four feet, with
368 parallel sides, smooth; usually quite extensive.

Q. State as to whether it was easy or hard to work it.

A. Like all stone when first taken out, it was easy to be wrought, and after it hardened.

Q. It was easy to get out?

A. Yes, sir.

Q. For what was it used?

A. It was used very largely for flagging sidewalks and walks.

Q. What else?

A. For buildings, particularly for large buildings, like churches and other large structures; used a good deal in furnaces, as it would withstand a great heat.

Q. State, if you please, in what places it has been used.

A. It has been used now or then?

Q. Had been used then; that was December, 1872.

A. If I am to confine it to my personal knowledge, that is one thing; if I am to confine it to common report—what I had learned by inquiry—that is another thing. I will answer it whichever way you direct me.

Q. I ask for both; both your knowledge and what you have been credibly informed?

369 A. I will speak first from my knowledge. To my personal knowledge it has been used largely in Montreal, Canada; also in Ottawa, the capital of Canada, about the city of Otawa, in the parlement building there, and also in Chicago, in New York, in Albany, and in many places in the more immediate vicinity of Potsdam, which can name if necessary—Canton, Norfolk.

Q. I don't think I care to know what you know by report. There were other quarries besides these in the town of Potsdam?

Ans. There were.

Q. State, if you please, the character of the stone and quarries named in the certificate of appr'sal, as compared with that of the other quarries in the town.

A. It was substantially the same.

Q. How long had you been familiar with the quarries in the town?

Ans. About 50 years; that is, all my life.

Q. How long had you been specially interested in the kind and quality of the stone?

Ans. About 18 years.

370 Q. During that time did you familiarize yourself with what the stone was?

Ans. I did.

Q. How much did the quarries in the certificate of appraisal cost you, money and property?

A. Reckoning in my own time that I had taken out of my other business, I reckoned then, and so reckon now, that they cost $40,000, including in that projects for the development of the quarries.

Q. I don't know what you mean by projects; in the cost, money, property, and time how much did they cost you?

A. $40,000.

Q. After you obtained the loan did you develop any of the quarries?

A. I did.

Q. Did you spend a good deal of money?

A. I did.

Q. To what amount during the year 1873 would you judge that you disbursed in the aggregate, saying nothing about receipts?

A. In working the quarries?

Q. Yes.

371 A. My best recollection would be from $15,000 to $20,000.

Q. About how much stone did you take out, as near as you can recollect, during the year 1873?

A. Reckoning the value delivered upon the cars at Potsdam?

Ques. Yes.

A. That was accutally placed upon the cars and sent away added to what we got out and was not sent away during that year I should think would make the value $60,000.

Q. During the year 1873 was there any particular time or any particular cause from which the sandstone business became stagnant?

A. Well, the great depression of money matters.

Q. At what time?

A. It began along about July.

Q. It culminated when?

A. Along in September and October, 1873.

Q. What effect did the money panic have upon you at that time, you and your business?

A. The same that it had on most people. It was of course disastrous to my business and property.

372 Q. Can't you specify a little more particularly?

A. I will if you will point out the direction which you wish.

Q. Both upon your property and your business?

A. It resulted in my financial failure about the 1st of January, 1874, and I made an assignment of my property.

Q. At the time the certificate was made, in December, 1872, estimating your property at the values that were then placed upon it, what were you personally worth?

A. About $30,000.

Q. What was your credit in the village or town of Potsdam and in the county of St. Lawrence at that time?

A. I suppose it was good.

Q. Don't you know?

A. Yes, I think it was.

Q. Was your solvency at all questioned, to your knowledge?

A. Not that I know of.

Q. State how many farms you were in possession of by yourself or tenants or contractees at that time.

A. Well, I should say from eight to twelve—some large and some small.

Q. About how many acres in all?

373 A. I should say from 2,000 to 3,000 acres.

Q. In what towns?

A. Potsdam, Brasher, Parishville, Pierepont, Norfolk. I don't think of any others at this moment.

Q. What would you say was the aggregate value?

A. Well, I should say from $40,000 to $60,000.

Q. What other property did you have at that time?

A. Do you desire me to mention the stone quarries?

Q. Yes; on the east & west side of the river.

A. Two on the east and eight, I think, on the west. I don't remember exactly the personal property on the farms.

Q. How about personal property on account-books, notes?

A. I had more or less of accounts.

Q. Notes?

Answer. Yes, sir; bonds, mortgages, and contracts.

Q. Library?

A. I had a law library that cost me about $2,000, I think.

Q. State as to your business at that time; was it a prosperous business?

A. Very.

Q. And as to your income; was it greater than your outgo?

A. Oh, yes.

Q. How much would you say at that time?

374 A. You are now speaking of what time?

Q. Along in 1872—about 1872.

I think it was some thousands of dollars over and above my expenses.

Q. After the certificate of appraisal was made, what did you first do with it?

A. I don't know that I can tell what I first did with it; the question seem' to point to that.

Q. In regard to the sandstone business?

A. I made use of it, after getting it, in trying to induce several parties to take an interest in the sandstone business in connection with myself.

Q. Name those parties, please.

A. Mr. Butler himself; I think his partner, Mr. Dunklee; Mr. George F. Paddock, of Watertown; some parties connected with the Agricultural Insurance Company, I think Muson or some of those; I think there was a man by the name of Wardwell, cashier of a bank in Rome. That is another place where the stone was used to build a Baptist church—in Rome.

Q. At the time the certificate was made, and prior thereto,

375 what preparation had you made in regard to ascertaining what the freight would cost, and other matters for going into the sandstone business more extensively?

A. I had made what I regarded as complete preparation for it.

Q. What preparation had you made?

A. I had ascertained so far as I could the cost of freight to different places by rail from Potsdam; I had also ascertained so far as I could the value and qualities of the stone as compared with other stones with which it would have to compete with in the market; the demand that would be likely to be made for it in different cities—Montreal, Ottawa, Syracuse, Albany, Utica, New York, Boston, and Burlington, Vermont; the expenses of quarrying the stone, working it, preparing it for market, and getting it from the quarry to the railroad depot at Potsdam.

Q. What effect did the commercial panic of 1873 have upon you?

A. It had a depressing influence upon my business and the value of my property.

Q. In regard to your landed property what?

376 A. There was a very large depreciation in value.

Q. In regard to your ability for raising money to carry on your business?

A. It dried up of course the sources of money. It made everybody who had any claims for money to be paid to make demands for them.

Q. Upon you personally?

A. Yes, sir; that is what I refer to. Those that had claims were driven—at least they did call for their money, and parties whom I expected to furnish money didn't, and claimed they could not.

Q. What became of your landed property?
A. I made an assignment about the 1st of January.
Q. Prior to that time what was done?
A. Subsequently it was largely sold on the mortgages upon it and at great sacrifice, if that is what you are aiming at.
Q. State as to your ability to raise money to carry on the sandstone business.
A. It did interfere with that.
Q. With the pay of your laborers?
A. Yes, sir.
Q. How large a force of men did you have then?
A. I think I had about 60 men.
377 Q. What was your average daily expense during the season?
A. It varied. A portion of the season, along when it got to be busy, after the 1st of July, 1873, I think, it seems to me it was about $125 a day. I don't remember exactly; I think that is about it.
Q. How as to the receipts from the sales of stone; what time were you to receive these?
A. We had to sell mostly on some time.
Q. You didn't have the money to pay current expenses?
A. No.
Q. You have named a gentleman by the name of Dunklee in connection with Mr. Butler. What was his business in connection with Mr. Butler?
A. He was his partner in the liquor business.
Q. And in regard to the correspondence between you and Mr. Butler, were some of the letters written by him for Mr. Butler?
A. Most of them.
Q. Written by him for Mr. Butler?
A. Yes, sir.
Q. To your knowledge, did he act as Mr. Butler's amanuensis?
A. He did, or clerk or secretary.
Q. And confidential business man?
A. He did.
378 Counsel for defendant produces and shows to the witness letters from Mr. Butler, dated November 8th, 1872; November 29th, 1872; December 3rd, 1872; December 5th, 1872; December 5th, 1872; December 10, 1872; December 11th, 1872; January 6th, 1873; January 7th, 1873; January 20th, 1873; January 23rd, 1873; and asks witness whether he received all of those letters from Mr. Butler, and which of them were in Mr. Butler's handwriting and which in Mr. Dunclee's handwriting.
A. Those of November 8th and November 29th are in Mr. Dunclee's handwriting; that of December 3rd is in Mr. Butler's handwriting; that of December 5th is in Mr. Butler's handwriting; that of December 10th is in Mr. Duncklee's; that of December 11th is not one of the letters; that of January 6th in Mr. Dunklee's; that of January 7th is in Mr. Dunklee's; that of January 20th is in Mr. Butler's; that of January 23d is in Mr. Duncklee's.
Q. Each of those letters you received, did you?
A. I did.
Q. By due course of mail?
A. Yes, sir.
379 Q. You are familiar with the handwriting of Mr. Butler and Mr. Dunklee both?
A. I am; perhaps I ought to examine them a little more carefully.

(Witness examines papers.) I endorsed them; that is my endorsements on the back of them.

Q. Mr. Gordon, what purpose did you have in view in obtaining this loan from Mr. Butler?

It was to carry on the stone business.

Q. Did you have any purpose or intention of cheating or defrauding Mr. Butler?

A. No, sir.

Q. At that time did you have full confidence that you could carry through that business to a successful termination?

A. I did.

Q. At that time state whether you had full faith in your own solvency and ability to carry out your engagements.

A. I had.

Q. At what time did you first lose your confidence in your ability to go through; about what time?

A. About December, 1873; the latter part of that year.

380 Q. Was it in consequence in whole or in part of any person's advice that you did not, in December, 1872, go on with the stock company?

A. I think not. It was because I could not raise the money.

Q. How was it; why didn't you go on with the stock company?

A. Why I didn't go on with the stock company in December, 1872?

Q. About that time, or January, 1873?

A. It was because of my inability to complete the organization in such a way as I wanted. Such a way as I anticipated being able to do by a little delay.

Q. Mr. Gordon, be kind enough to give me the dates of some of the letters you wrote to Mr. Butler.

A. You say some of the letters. I have no doubt these are correct copies. (Referring to package.)

Q. Give me the dates; you can refresh your recollection with anything you please.

A. August 15, 1870; June 16, 1870; June 29, 1870; December 28, 1871; October 26, 1872; December 4, 1872; Dec. 6, 1872; Decem-
381 ber 12, 1872; December 8, 1872; Nov. 9, 1872; November 20, 1872; Nov. 30, 1872; November 30, 1872; January 8, 1873; January 21, 1873; January 25, 1873; January 27, 1873; Feb. 5, 1873; Feb'nary 21, 1873; April 9, 1873; August 19, 1873; August 23, 1873; Aug. 23, 1873; Aug. 25, 1873; Aug. 28, 1873; September 4, 1873; Sept. 5, 1873; September 6, 1873; September 9, 1873; Sept. 12, 1872—I think that must be a mistake; I judge so from the contents of the letter; I know it should be September 12, 1873—Sept. 11, 1873; Sept. 15, 1873; November 1, 1873; Nov. 25, 1873; Nov. 27, 1873; November 28, 1873; Nov. 29, 1873; December 3, 1873; Feb'uary 23, 1874; March 12, 1874; March 18, 1874; March 23, 1874; and March 30, 1874.

Q. There are not by any means all the letters you wrote him?

A. No, sir.

Q. During those periods?

A. I could not say about that.

Q. You have not examined sufficiently?

A. I have not. I see the dates are somewhat scattered from the earliest to the latest dates.

Cross-examination by Mr. A. X. PARKER, counsel for plaintiff:

382 Q. You say you knew the plaintiff first about fifteen years ago?

A. I should think about that.
Q. Where were you then residing?
A. At Potsdam.
Q. And had resided there all your life?
A. Yes, sir.
Q. How long had you known defendant Foster?
A. You are now speaking of——
Q. I am speaking of the date when you first knew Mr. Butler. How long you had then kno'n defendant Foster?
A. Fifteen or twenty years.
Q. How long have you lived in the same village with Foster?
A. All my life, till about a year and a half ago.
Q. About what is his age?
A. I think he is about sixty.
Q. On what terms have you been with him during this period; speaking terms?
A. O, yes; friendly terms.
Q. Friendly, social, and business terms?
A. Both.
Q. During all this time?
A. Yes, sir.
Q. How long have you known the defendant Watkins?
A. About the same time.
383 Q. How long have you resided in the same village with him?
A. All my life, and he has lived there about the same time. I think he came there about the time Foster did. I was born there; they came there afterwards.
Q. You have lived in the same village with Watkins for thirty years or more, thirty or forty?
A. I should think it must be 30 years ago. I think they came there about 1840.
Q. During that time what has been your relation with Watkins?
A. Friendly.
Q. Both as to social and business relations?
A. Both.
Q. You had done legal business for him occasionally during all that time?
A. All that time; after I commenced the practice of the law.
Q. How long have you done business for him as attorney?
A. I think from about 1855—not a great deal—something—I think, during all that time.
Q. Ever since 1855 until you left business there?
A. Yes, sir.
Q. All this occurred at this same place of Potsdam?
A. Yes, sir.
384 Q. During the past ten years have the two defendants, Watkins and Foster, been engaged in any business together?
A. They have.
Q. What?
A. They have been merchandizing together. I think they kept a store and owned a flouring-mill there together for a few years back.
Q. About how many years?
A. They bought the mill and store about the same time, that was about the 1st of January, 1873; before that they had been indirectly connected with the same business, but not directly; since that they have

been join' owners, until, I understand, they sold out, I think, a few weeks or a few months ago.

Q. You think they went together in the mill and grocery-store business?

A. Yes, sir.

Q. About January, 1873?

A. I think it was.

Q. Had they, to your knowledge, been jointly interested as endorsers in the same business?

A. They had.

Q. For several years previously?

A. Two or three, I think; possibly more.

Q. Who were the parties for whom they were so interested as endorsers?

385 A. David K. Brown and Edward Hitchings.

Q. Firm name?

A. Hitchings and Brown.

Q. Where was this store located?

A. Potsdam village, on Market street.

Q. How far from your place?

A. Directly opposite, across the street.

Q. And your residence was within what distance during the last ten years of the residences of Watkins and Foster?

A. I should think about 100 rods.

Q. What pending business had you left of plaintiff's in your hands in 1874?

A. Well, I think that I was foreclosing some three or four mortgages. Yes, I think perhaps from three to 5 mortgages I had in my hands; I don't think of any others.

Q. Those foreclosures were commenced something more than a year previously, or what time previously?

A. I think they were commenced during the year 1873, most of them.

Q. 1873?

A. 1873.

Q. What part of the year?

A. Well, I don't remember; they were all, I should say, commenced some time previously; my best recollection would be during the year 1873.

386 Q. Can't you state anything more definate about it?

A. I don't think I could.

Q. Whether it was the spring of 1873?

A. I could not; my impression is it was not in the spring, but later; there is a possibility that some might have been commenced in the latter part of 1872, but that is not my recollection.

Q. You procured money of him upon loans?

A. Yes, sir; I did.

Q. From different parties?

A. I thought you referred to my own.

Q. Very well, we will take them in that way; for your own use?

A. I did.

Q. Did you ever borrow any money from him for your own use previous to January, 1873?

A. I think not.

Q. You know, don't you?

A. I think not.

Q. I would like a positive answer.

A. Yes; I think I know nothing prior to that time.
Q. You answer positively as to that?
A. I do.
Q. Previous to that time had you ever received money from him, loans to others, except upon real estate in any case?
A. I had.
387 Q. In how many cases; more than one?
A. I think not.
Q. That was the Duffy and Gilbert note, sum of $1,500?
A. That is all I remember of.
Q. That is the only instance of receiving money from him upon loan except upon real estate security?
A. Yes, sir.
Q. In obtaining loans upon real-estate security did you act as the agent of the parties obtaining the loans for plaintiff?
A. Well, yes; in a measure.
Q. Did you or did you not?
A. Well, they made application to me, and I forwarded them to Mr. Butler; yes, in one sense; I acted as their agent.
Q. I repeat the question: Did you, in obtaining these loans upon real-estate security, act as the agent for the parties obtaining the *the* loans?
A. I did.
Q. In every instance?
A. I did.
Q. In the note loan you have mentioned was the money sent to you before you sent the note to the plaintiff?
388 A. I don't remember how that was. I couldn't tell without reference to the letters that passed at that time. I can give you my best recollection, such as it is, if you wish.
Q. Who paid you for obtaining these loans of plaintiff?
A. The parties for whom I got the loans.
Q. In every instance?
A. Yes.
Q. Did the plaintiff ever pay you anything for obtaining any portion of these loans?
A. I think not.
Q. You spoke of Mr. Cook's acting as attorney for Mr. Butler in that county; did you not know of McNaughton also acting as his attorney?
A. It seems to me I did know of his acting in one instance.
Q. Did you only know of one?
A. I don't know; I think I heard of his acting in one instance.
Q. Mr. Butler also had attorneys at Watertown, in the adjoining county of Jefferson?
A. I think not.
Q. Did he have Mr. Vickery?
A. He lived in Adams.
Q. He had at Adams, in Jefferson Co.?
A. He had one formerly.
Q. And he had Starbuck, at Watertown?
389 A. Yes, sir.
Q. You say the intimacy between yourself and the plaintiff grew stronger towards the last, as I understood you; toward what period, what date?
A. Well, I think up to about August, 1873.
Q. Then it began to wane, do you mean?

A. I was unable to pay him. I owed him money, and of course he was displeased at it; so, of course, our relations were different.

Q. During what period did this intimacy go on increasing?

A. Well, for three or four years, or two or three years prior to the date I last named, August, 1873.

Q. What do you mean by this intimacy; how close was it?

A. I don't know that I could explain it.

Q. Anything more than ordinary business good-will?

A. I couldn't tell you; I don't know how to answer your question.

Q. Was it more than business good-will; if so, in what was it more?

A. He exhibited personal interest in my business success, and we were somewhat intimate socially.

390 Q. He exhibited an interest by asking about your business?

A. He exhibited it by our having conferences about each other's business, he telling me about his and I telling him about my own.

Q. Was that the only intimacy—was that the nature of the intimacy?

A. That was a part of our intimacy; another part was our social intercourse with each other.

Q. What other social intercourse than what you have mentioned?

A. Do you want I should give the time I saw him?

Q. I don't know what you designate by social intercourse. I don't know what you mean, whether at you office or something different.

A. Both at my office in Potsdam and his office in New York. At his hotel in New York and my house at Potsdam.

Q. When at your house at Potsdam?

A. I could not give you the dates.

Q. Any time in 1872?

A. I think so.

Q. Do you recollect any particular time when he was there at your home in 1873?

391 A. I could not give any dates. I know he has been at my house several times; I could not give the dates.

Q. Do you remember, in speaking to Mr. Butler in one of your letters of Mr. Foster, that he had met Mr. Foster at your house?

A. I do.

Q. How came Mr. Foster to be at your house that night?

A. I invited him there.

Q. About when was that?

A. I could not tell you.

Q. Give us the year, if you please.

A. I could not do it.

Q. Can't you tell what year it was?

A. I could not; I could not tell whether it was 1872 or 1873; a reference to the letter will show.

Q. Was it in October, 1872.

A. I could not say, very likely.

Q. You can't say certain?

A. I could not.

Q. Do you remember that Mr. Butler ever met other parties at your house except at that time?

A. I don't remember now.

Q. You say Mr. Butler proposed to establish a bank in Potsdam?

A. He did.

Q. When was that?

A. I should think it was about 1872.

Q. Did you ever write to him upon the subject?

A. I did.

392 Q. May it not have been as early as 1870?

A. It might.

Q. Can't you tell more definately?

A. I don't think I could; it is my best recollection that it extended through more than one year.

Q. Look at your letter to plaintiff dated June 6th, 1870. (Letters handed to witness.) Is not that letter the first inception of any negotiation between you and the plaintiff in relation to the bank mentioned? I would like you to look at the letter enough to satisfy yourself before you answer.

A. I think not.

Q. You think it is not?

A. I think not.

Q. Was any letter written upon the subject previous to that?

A. I could not say; I don't remember.

Q. Can't you say whether there was or not?

A. I can't.

Q. Can you specify the time of any conversation between you upon the subject?

A. I could not, except it were from the letter itself; I see the letter refers to a prior conversation.

Q. Point out the sentence you refer to.

A. The first sentence of the letter.

393 Q. That is what you refer to?

A. Yes; I could not have told that except by looking at the letters.

Q. Have you any recollection of any place where you had any conversation with the plaintiff in relation to that subject matter?

A. Not a distinct recollection, except a general recollection of where our conversations usually were.

Q. Can you specify any particular conversation occurring previous to the date of this letter in which that subject was mentioned between you?

A. I could not.

Q. Can you swear positively you had any such, that you recollect?

A. According to my best recollection, we had.

Q. Do you recollect such conversation?

A. Not a particular conversation.

Q. Do you swear that the plaintiff introduced the subject of locating a bank at Potsdam before you mentioned it to him?

A. I have not sworn anything on the subject yet.

Q. Do you state that any such thing occurred?

394 A. I could not say who introduced the subject first, he or I.

Q. Why did you advise or request him to consider the subject of locating a bank at Potsdam, with yourself for cashier or manager?

A. I could not say whether he mentioned it to me first or whether I mentioned it to him; my impression was & still is that he mentioned it to me first; still I would not say that with any positiveness.

Q. You have no recollection then of his doing so?

A. I have not.

Q. You have only an impression?

A. That is all; I judge partly from that letter.

Q. More from the letter than from your recollection?

A. Well, I had an indistinct recollection of it, that that was the

order in which the thing came, and then I see the letter seems to intimate the same thing.

Q. In the first sentence?

Yes, sir.

Q. Who did you propose to Mr. Butler to act as president of the bank?

A. I don't remember.

Q. Did you propose Mr. Watkins as president of bank?

395 A. I don't remember whether I did or not; I could give you an impression in regard to it; it would only be another way of saying my best recollection.

Q. What is your recollection on that subject?

A. I think I did.

Q. Propose defendant Watkins as president of this bank?

A. I think he was sujessted as one.

Q. They were not going to have a half a dozen presidents. I ask you if you didn't propose Mr. Watkins as president of that bank?

A. I think his name was one of those that were mentioned; that is my recollection.

Q. Who were the others to act as president?

A. All I can say is this: My impression, my best recollection, is that two or three names were suggested as president. I think Watkins was one; still that was a thing I had forgotten entirely until you recalled it now, and the other names I could not give you, but there were more than one.

Q. Do you remember any other names suggested to act as president?

A. I do not; it would be more a matter of reasoning than recollection.

Q. Do you remember any other names?

396 A. I do not.

Q. As to the business in which Mr. Butler and Mr. Dunklee were engaged at New York you proposed to buy them out, did you?

A. I had negotiations with Mr. Butler and Mr. Dunecklee in regard to that.

Q. Made them a proposition, did you?

A. I don't know whether it ever got to the point of a proposition or not. I could not say without reference to the letters. The subject was discussed and negotiated about, but whether it proceed' to a distinct proposition or not I could not say without consulting letters.

Q. You have no copies of those, I suppose?

A. No; some of the letters I wrote to him I did keep copies of, quite a number.

Q. You kept copies of quite a number of letters you wrote to him?

A. Yes; I have not looked at them for years.

Q. Did you solicit them to keep an interest in the ; sell you an interest in it and join you?

A. I did.

Q. And they declined to do so, did they?

397 A. They did.

Q. You say you had an oral negotiation with plaintiff in 1863 to 1874 in relation to the sandstone business. What negotiations did you have in 1868 with him in that regard?

A. I could not tell you when the negotiation began.

Q. Do you remember anything you can say occurred in 1868?

A. I could not. I think I was not discussing it for myself then. I think it was temporarily abandoned.

Q. You think there was none as early as 1868?

A. I should say so.

Q. Can you specify any negotiations with him upon that subject in 1869?

A. I *I* could not.

Q. Can you swear positively that you had any such?

A. I could not now.

Q. Can you specify any conversation you had with him in 1870 upon that subject?

A. I could not.

Q. Can you remember or swear that you had any such negotiations in 1870?

A. My best recollection is I did.

Q. Can you swear positively you did?

A. I could not.

398 Q. Can you specify any conversation you had with upon the subject in 1871?

A. I could not.

Q. You are not able to designate any such conversation in 1871, are you?

A. I am not.

Q. Can you state anything that was said between you upon that subject in any conversation in 1871?

A. I could not.

Q. Will you look at letter dated December 28th, 1871, from yourself to plaintiff? (Letter handed to witness.) Can you swear that you ever introduced the subject of said stone quarries or that business at Potsdam to Mr. Butler until you wrote him that letter?

A. I think I did before that.

Q. Can you swear you did positively?

A. No; I wouldn't do that.

Q. You say the plaintiff loaned you $5,000 in June, 1873?

A. Yes, sir.

Q. That was done in New York City?

A. It was.

Q. At his place of business?

A. It was.

Q. Where was defendant Watkins then?

A. You mean in what particular place or in what city?

Q. Whether he was there with you?

399 A. He was not with me; he was in New York.

Q. And came in before you left Mr. Butler's place of business, with the money?

A. My impression is he did; that would be my best recollection.

Q. What business were you and he at New York on?

A. I went down on my sandstone business. I could not now recollect what he went for; I do not now recall.

Q. You were at that time acting as attorney for Foster & Watkins in the matter of Hitchings vs. Brown?

A. I was.

Q. Was not Watkins at New York upon that business?

A. I think he was. I think I recollect now about it.

Q. How happened he to come into Mr. Butler's place of business?

A. I think I asked him to go with me down there.

Q. You asked him to call in by and by; you don't mean to say he went with you?

A. That was my impression; I had forgotten the whole circumstances. I think he went with me.

Q. That is as near as you recollect about it?

A. Yes, sir.

400 You speak of attending the theatre with Mr. Butler, did you go with him or he with you?

A. I don't remember.

Q. Whether it was on your invitation or on his?

A. I don't remember.

Q. Didn't you invite him to go, and present him with a ticket?

A. I don't remember. I don't distinctly remember we went, but I think we did. I don't remember where we did go; that is one of the reasons I don't recall it.

Q. Was this $5,000 you got intended to be used in the sandstone business?

A. It was.

Q. Did you say to the plaintiff when you got it in the presence of Mr. Duncklee?

A. I don't remember.

Q. Didn't you talk about it being for that purpose, when you got the money?

A. I have no distinct recollection about it. It would be more a matter of reasoning than anything else; as a matter of recollection I could not state.

Q. Didn't you give any reason for wanting the money?

A. I presume so; I don't remember; of course I must have given a reason.

401 Q. Did you give the true reason, what you wanted it for?

A. Yes, sir.

Q. Mr. Duncklee was present, was he not?

A. Where?

Q. At the time you got this.

A. No.

Q. Did you see him during the time you were in Mr. Butler's store?

A. I did. I think I saw him also.

Q. Where did you receive the money, up or down stairs?

A. Up stairs.

Q. Did you have conversation about the matters below?

A. No; I think not.

Q. Are you positive about that?

A. No; my best recollection is we went into another room; he took me out in o a lumber room.

Q. And you had no conversation in the store?

A. I would not say that—I have no recollection.

Q. You may have had some.

A. I may have had; yes.

Q. Did you tell the plaintiff you wanted the money to use in the sandstone business in place of some you had expected of Mr. Paddock?

A. I presume I did, but I don't recollect it.

Q. That was the fact, was it?

Ans. Yes, sir.

Q. You say that from 1865 to 1872 plaintiff knew considerable

402 about your business, did he know anything except what you told him?

A. I don't know.

Q. Do you know of his knowing anything except what you told him upon that subject?

A. Yes; I think I do.

Q. What?

A. I could not tell.

Q. You don't know about that.

A. He has told me of what others have told him, that I was doing a prosperous business; something like that, or more.

Q. What occurred?

A. I could not tell you what occurred.

Q. Nothing more that you remember?

A. I think he has told me several times of things that others have told him, in regard to my being prosperous and successful.

Q. When was that?

A. I think along from 1865, forward.

Q. Forward till when?

A. I could not give any definite time; two or three years after that.

Q. That would be from 1865 till 1868, do you mean?

A. I should judge that.

Q. You have no recollection of anything of that kind after 1868, have you?

403 A. Some of these that I am speaking of might be after that.

Q. Were they that you remember?

A. I could not say.

Q. Can you state the time and place of any of those conversations?

A. I think I can.

Q. State what you can in regard.

A. I think in my office, it must have been alone, in 1866, I think I recollect his telling me distinctly that I was a prosperous man, a successful man, and an energetic man; that was along toward the beginning of our more intimate acquaintance.

Q. Do you recollect any conversation after that, you can specify time or place?

A. I don't think I could specify time or place, the only reason I remember that is it was about the first.

Q. Can you give the details of any subsequent conversation in that respect?

Ans. No; I could not.

Q. You never exhibited to him any of your property, I suppose?

A. My impression is we looked at property I showed that

404 belonged to me.

Q. Do you remember any instance where you showed him your property?

A. Yes.

Q. What is it?

A. I think I showed him the sandstone lots, these very lots that are mortgaged to him for $10,000.

Q. When?

A. I think I showed him once, I remember particularly, was on Sunday we went out riding; he was at Potsdam and went out riding went out riding and drove past them, and I showed them to him.

Q. That was when?

A. I think that was in 1873.

Q. About what time in 1873?

A. I should say about July. It might have been 1872. I couldn't say about that. I think I showed him my grist-mill at the same time.

Q. How near the quarries did you go with him?

A. We went right past the lots.

Q. In the highway?

A. Yes, sir.

Q. Did you go any nearer than the highway?

A. I think not. I think we did not get out of the carriage at all. I may be possible mistaken about driving around there; I think not.

405 Q. What time in the year was it that you went there with him?

A. I think in July or August, 1872 or 1873.

Q. Can the quarries be seen from the road?

A. I think not. I am inclined to think, on further reflection, that we did not drive around there. I recollect coming back and our riding together in a carriage. We came down Pierrepont avenue. On further reflection, I think we didn't go around there, instead of that we went by the Parishville road and came on Pierrepont avenue by that way.

Q. On further reflection you are satisfied you never road past the quarries with Mr. Butler?

A. I don't remember doing so then.

Q. Do you remember doing so at any other time?

A. I do not.

Q. You never showed him these sandstone-quarry lots?

A. I have no recollection of doing so, unless we went around that time. On further reflection, I think I am mistaken.

Q. What other property did you show him, if any?

A. I have not showed him any.

Q. (By defendant's counsel.) You showed him the grist-mill property?

406 A. That would be on the same route. I don't think we rode around there, on further reflection.

Q. (By counsel for plaintiff.) Did you show him any of your property?

A. I don't remember.

Q. Did you ever invest any money in connection with him?

A. Not that I know of. I don't recollect any now.

Q. Did he ever propose to invest any money in any speculation with you?

A. I don't know that he ever did, except this matter of the bank.

Q. Except this matter of the bank?

A. And the matter of the stone quarry.

Q. And those you have told us about, have you?

A. Yes, sir; no, I don't think he made a distinct proposition.

Q. You say Mr. Butler sometimes advanced money to remove liens, &c., did he do that before he notified you, as agent for the parties wanting money, that he excepted of the loans if the title could be clear?

A. I think not; it was either expressed or implied in all those cases.

Q. When did you first commence obtaining money from him

407 for your clients?

A. I don't remember.

Q. Now, what was the date of the first money so obtained?

A. Well, I should say about 1869 or 1870.

Q. Did you at that time, or previously, know his rules for loaning money?

A. I don't know that I did.

Q. Didn't you know what security he would require?

A. I knew that when he loaned money in that country where I was dealing what he wanted in the way of security.

Q. What was it?

A. Farming lands, improved farming lands.

Q. Worth how much?

A. Worth double the amount of the loan.

Q. Including or exclusive of the buildings?

A. The theory was exclusive of the buildings.

Q. You knew those were the rules he required to be complied with as early as 1870?

A. Whenever I loan money for him I knew that those were the rules, whenever it was.

Q. Whenever you commenced loaning for him?

A. Yes, sir.

Q. Or loaning money of his?

A. Yes, sir.

Q. You say you collected money for Mr. Butler and sent him
408 by your check?

A. Yes, sir.

Q. Do you mean to be so understood?

A. I do.

Q. Did he ever authorize you to collect money for him except when he had to proceed to foreclosure or legal proceedings?

A. Yes, sir.

Q. When?

A. I do not give you the dates.

Q. Did you not act as agent for the parties making the payment in sending the money for them to Mr. Butler?

A. I did in some cases.

Q. Wasn't that the usual case, that they brought money to you and you sent it for them to him?

A. No; I think I sent more the other way, at his request; if you will make a distinction perhaps it will aid you in your examination, still it is not for me to make any suggestions.

Q. I don't see it would help us any. Where were the mortgages made payable?

A. I think at the National Bank of the Republic in the city of New York.

Q. Principal and interest?

A. Yes, sir; that is my present recollections.

Q. In all cases?

409 A. I don't remember any cases different from that.

Q. Who are the parties you claimed to have had authority to collect principal or interest of?

A. One of them was H. B. White, or else White's wife; perhaps White's wife.

Q. That was not a loan you made?

A. No.

Q. That was a collection?

A. A collection.

Q. I am asking as to collecting interest upon loans, bonds, and mortgages.

A. That was the distinction I suggested to make; you didn't make it.

Q. Did you have authority from the plaintiff at any time to collect

any of the principal or interest upon any of these bonds and mortgages, payable in New York City?

A. I think I did.

Q. In what cases?

A. I think in the case of Joseph H. Butler, and another one, A. C. Leonard; still that is a matter of construction.

Q. Any others?

A. I don't remember.

Q. Was J. B. Butler a man under your particular charge?

Q. Was that done at your request as to J. H. Butler?

A. My impression is it was, brought about wholly by my interference in the matter on behalf of J. H. Butler and Leonard, and that he then wrote to me to not crowd them.

410

Q. Did you not request the privilege of collecting from J. H. Butler, so that if he went into bankruptcy you could apply it on the debt you had against J. H. Butler while he could collect his bonds and mortgage?

A. That is my exact recollection of it; I should have had no recollection of it if I had not read the letters since this morning.

Q. Did you not request the privilege of collecting from Leonard?

A. I think so; I think those were brought around by my direct interference.

Q. You received no other authority?

A. None that I remember; I don't remember any.

Q. Won't you look at your letter to the plaintiff dated October 31st, 1872, and state whether that was the commencement of the negotiation for the loan of the $10,000 in controversy.

(Letter handed to witness.)

A. I could not say.

Q. Why can't you say?

A. Because I don't remember.

Q. I think if you look at it you will satisfy yourself.

411

A. I could not say whether that was the first or not.

Q. What is your best recollection?

A. I should have to look it over more carefully, and think of it more; does this speak about this loan?

Q. No; but this negotiation in regard to assistance in the sandstone business.

A. What is your question?

Q. My question is whether that was the inception of the negotiation which resulted in obtaining this $10,000 in controversy?

A. I think not, so far as the examination I have given it, it does not speak of it at all, still I have not read it through. I will read it carefully through, if you desire.

Q. You think the inception of the negotiation was after this date?

A. My impression is it was. What was the date of that?

Q. October 31st, 1872.

A. I could not say about that; all I could say is, I don't see anything in the letter in regard to it.

Q. You have no recollection of anything previous to that?

412

A. I could not say I have now.

Q. When did you first see the papers called the certificate of apprisal?

A. I think about December, 1872; I should say about that time.

Q. In what connection was it where you first saw it, as to being signed?

A. It was not a paper until it was signed on apprisal. I drew the apprisal and they signed it; that is my handwriting, I believe.
Q. Did they sign it in your presence?
A. I could not say.
Q. Why not?
A. I don't remember whether they did or not.
Q. Did either of them sign in your presence?
A. I don't remember.
Q. Did it ever pass out of your possession after it was written and before it was signed?
A. I don't remember about that; I have no recollection about it.
Q. Can you state what was the fact about it?
A. I could not.
Q. You have no copy of it, have you?
A. I have.
413 Q. Was it written at the time it bears date?
A. I suppose so.
Q. Do you know anything about it?
A. As a matter of recollection I could not say, as a matter of reasoning I should say it was written just at the time it was dated.
COUNSEL FOR DEFENDANTS. We don't desire anything based upon reasoning.
A. I don't remember in regard to that.
COUNSEL FOR PLAINTIFF. Q. What is your best recollection as to its being signed the time it was dated?
A. I think it was.
Q. Where was it signed?
A. At Potsdam.
Q. In your office?
A. I could not say in regard to that. No; I think not.
Q. Where was it?
A. I have no recollection about it; I have a faint recollection that Foster signed it at his office, still I don't speak with any positiveness about it.
Q. What is you' best recollection as to where Watkins signed it?
A. I have no recollection about it; I could not say.
A. How came you to write the papers?
A. Well, I don't know I quite apprehend your question.
414 Q. What did you write it?
A. That is the same thing you had before; I wrote it to have it signed.
Q. By whom?
A. By Watkins & Foster.
Q. Anybody else?
A. Not that I know of; not that I recollect of now.
Q. Did you talk with Charles Cox about signing it?
A. I don't remember.
Q. You will not say you didn't?
A. No.
Q. Did you talk with Mark Pormiter about signing it?
A. I have no recollection of it.
Q. Can you say you didn't?
A. I could not.
Q. How long was it written before it was signed?
A. I could not tell you.
Q. A week, or a month, or a day, or what?

A. My best recollection is it was not more than a day or two, perhaps three; I don't know it was as long as that.

Q. Did you have any talk with Watkins about signing it before he did sign it?

A. I think I did.

Q. Did you explain to him what you wanted it for? I only call for an answer, yes or no, now.

A. I did.

415 Q. Your best recollection is it was signed by them on the day it bears date?

A. I couldn't say quite that.

Q. Give your best recollection as to the time intervening, if there was any.

A. Do you want I should repeat what I testified?

Q. I don't remember what you said. I wish to know, as definately as you can now state, whether it was signed on the day it bears date; and, if not, how near that date.

A. I think it was signed within one or two or three days of the time it was dated.

Q. You are related to Foster by marriage?

A. No.

Q. Your daughter is the wife of Mr. Foster's son, I believe?

A. She is; that makes a connection, but not a relation.

Q. When were they married?

A. You are talking about my daughter and his son?

Q. Yes.

A. They were married in September, 1874, I think it was.

Q. And were engaged at the time of this apprisal certificate?

A. I think not; not to my knowledge, at least.

Q. When did you come to St. Louis?

A. The 21st of October, 1875.

416 Q. Your assignment you have spoken of was made when?

A. I think about the 19th of January, 1874.

Q. Who was made your assignee?

A. John A. Vance.

Q. Immediately previous to that assignment, did you assign considerable property to your wife?

Q. (By defendant's counsel.) Was there any such assignment in writing?

A. Yes, sir.

Question by counsel for plaintiff. Where is that writing?

A. I don't know; I think she has it.

Q. And she is living with you here?

A. She is.

Q. Will you produce that writing?

A. I can to-morrow, I presume.

Q. Immediately previous to that assignment, did you assign considerable of your property to your wife?

A. I did.

Q. Upon indebtedness existing at the time, this loan was made in part?

A. No part of it, according to my best recollection.

Q. It all accrued after?

A. It all accrued at the time the assignment was made.

417 I gave her an assignment of certain property, and she assigned

other property to me that was more available to me or to my order.

Q. Will you produce those papers to-morrow?

I will, if I can get them; I think I can.

Q. The farms you have spoken of, were they all mortgaged?

Ans. They were not.

Q. In 1872?

A. They were not, I think.

Q. What ones were not?

A. I recollect one that was not—that was a portion of the Coolidge farm.

Q. Any others?

A. I think there was; there were some lands I owned down near Potsdam Junction.

Q. Can you specify?

A. I could not; I think I owned seven or eight lots there. I couldn't go through a detailed statement of them from recollection.

Q. Was not the real estate you speak of as farms largely encumbered?

A. It was, the most of it.

Q. By mortgage upon which the farms were subsequently sold?

A. Some of them were.

Q. Wasn't that the case in nearly every instance?

A. I couldn't say that now without examining more particularly.

Q. In December, 1872, you say you were worth $30,000?

Ans. I was.

418 Q. In that, do you include an interest in the stone ledge and quarry property?

A. I do.

Q. You didn't include in that you' house and lot?

A. No; I didn't own that.

Q. That belonged to your wife?

A. Yes, sir.

Q. What amount did you then owe?

A. I could not tell you.

Q. Can you approximate the amount?

A. I don't think I could.

Ques. Can you tell within $10,000?

Ans. I could not, not without looking it up.

Q. Could you tell within $10,000 without looking it up?

Ans. I don't think I could.

Q. Were you not owing $50,000 at that time?

Ans. I think I was.

Ques. $75,000?

Ans. I should think I was, but perhaps not so much as that.

Ques. It may have been as much as $100,000?

Ans. No; I don't think it was $75,000. It might have been; I couldn't speak more definately than that.

419 Q. Is your estate settled by the assignee, Mr. Vance?

Ans. I don't know.

Ques. What amount will your estate creditors to be paid, in your judgment; from your knowledge of the property, what amount?

A. I think they will get very little.

Q. More than five cents on the dollar?

Ans. I don't think they will.

Q. Then you' solvency that you speak of was subject to that great indebtedness?

A. It was.

Ques. And to the fluctuations of business?

Ans. Yes, sir.

Ques. And to your success in getting loans to keep yourself good with your creditors, was it not?

A. No, sir; I think not.

Q. You say that the stringency of the times induced creditors to make collections sharply?

Ans. That was a year and a half afterwards.

Ques. In 1872 your solvency depended in part upon the leniency of your creditors, didn't it?

Ans. No; I was not solvent in 1874.

Q. Up to what time in 1873 were you solvent, in your judgment?

420 A. I think *think* I was up to the first of January, 1874; about that time.

Q. You fix the date of your becoming insolvent on the 1st of January, 1874?

A. I do.

Q. What, in your judgment, were you worth on the 1st of December, 1873?

A. $50,000.

Q. $20,000 more than you were the year before?

A. Yes, sir.

Q. Had you made that $20,000 out of the stone business?

A. I had.

Q. How much had you expended during that year in the stone business?

A. My best recollection is somewhere from $40,000 to $60,000, but I may not get it correct; I couldn't tell you. I could not state more definite than that.

Q. On the last day of December, 1873, what were you worth, in your judgment?

A. I think I was insolvent.

Q. It occurred during the month of December?

A. Yes, sir; I could not get through with my difficulties—of course, everything was wasted.

Q. Where was the $20,000 you had made during the year 1873?

It was in the sandstone business, and property.

421 Q. In the ledges or in stone; or in the debts, or where?

A. It was in a combination of the whole, being organized into a regular business and corporation; organized, and the business being carried through one season successfully. I was combining prices of property and elements of that business, which I had been getting together for about 15 years or more.

Q. This $20,000 included what you had made in sandstone stock, did it not; or stock of the sandstone company?

A. No; I hardly know whether I should answer you yes or no to that; I don't regard I made anything in the stock; but in the organization and completion of the business as a running business, a business in active operation, I regarded it added $20,000 to my property. I couldn't give it to you any more definate.

Q. In money?

A. Not in money.

Q. Was any of this increase in money?

A. I had some money in hand.
Q. Was any of this increase in money, as you estimate it?
A. No; I think not.
Q. You during that year organized what you called the Potsdam Sandstone Company, did you not?
A. I did.
422 Q. Was that one of the elements of the organization of this business you speak of?
A. It was.
Q. That contributed to the making of this $20,000?
A. It did.
Q. In December, 1873, your business was stock, was it not?
A. It was.
Q. You were then arrested upon civil process?
A. I was.
Q. And remained in custody how long?
A. I think about 60 days—no, I don't remember how it was.
Q. And finally you were indicted in relation to the same matter?
A. No; I was not.
Q. Were you not indicted in relation to the obtaining of $5,000 from John Scullin?
A. You asked me if it was the same matter.
Q. Yes.
A. It was not.
Q. That didn't relate to the same subject-matter?
A. No.
Q. Were you not indicted in relation to the obtaining $5,000 from John Scullin?
A. I was.
Q. How much was the amount on that?
A. Above $8,000, if I remember rightly.
Q. That you were unable to pay out of your own property, were you?
A. I was.
423 Q. Your wife afterward paid it out of her property at your request?
A. She did.
Q. Because you hadn't property to make it?
A. She had more available property.
Q. In your assignment what value did you put upon sandstone stock?
A. I don't remember.
424, 425 Q. Don't you recall it?
A. I do not.
Q. In your letter to plaintiff, dated Dec. 4, 1874, you say, "I expect, of course, to give you for a loan of $10,000 real estate security worth in these or any possible times $20,000; title perfect, and no encumbrance;" does that refer to the loan mentioned in the pleadings in this case?
A. I don't think it does.
You say in the same letter, "What appraisal or evidence of value of the quarry lands do you want?" Was that in reference to an appraisal of the lands upon which you obtained this $10,000?
A. It was.
Q. Had you previously mentioned anything as to that appraisal to him that you recall?
A. I think not.

Q. In your letter to the plaintiff of Dec. 6, 1872, you say, "And whose appraisal do you wish me to get, or in what way shall I satisfy you of the value?" Tell me whether that refers to an appraisal of the same lands?

A. It does.

Q. In your letter of December 12, 1872, you say, "I was stupid enough not to get your idea as to the valuation or appraisal of the quarry
426 lots. Having got it through my head, I will have such appraisal made as I think will satisfy you, and submit it. Then, if it does not prove satisfactory, we will have Mr. Cooke or any one else you name appraise them." Does that refer to the same appraisal?

A. It does.

Q. Did you obtain any appraisal in accordance with that letter?

A. I think I did.

Q. What is it?

A. The one that has been given in evidence—I don't know whether it has been put in evidence. It has been talked about here.

Q. The certificate of appraisal signed by Foater and Watkins?

A. Yes, sir.

Q. You obtained that certificate of appraisal for the purpose of obtaining the loan from Mr. Butler, did you?

A. That and other purposes.

Q. The appraisal bears date the same date as this letter, I understand you?

A. No; you haven't understood me so.

Q. I ask you?

A. I don't know. (Letter shown to witness.) Show me the appraisal and I will state. This is dated the 12th of December; what the date of the appraisal is I don't know.

Q. Was the letter written Dec. 12th?

A. I suppose so. I don't know.

427 Q. Was that not written the same day you wrote the appraisal?

A. I could not tell you.

Q. What is your best recollection?

A. I have no recollection in regard to it.

Q. How do you say?

A. I don't say anything, because I don't know your question.

Q. I ask you to state whether they were not written on the same day, to the best of your knowledge?

Q. You are now speaking of this letter and appraisal?

A. Yes.

A. I could not tell you anything about it; I don't know what the date of the appraisal was.

Q. You have a copy of it?

A. No, I have not. I can't answer it, because I don't know what the date of the appraisal is.

Q. When you wrote the appraisal you intended to use it with the plaintiff for the purpose of obtaining this loan, did you not?

A. I presume I did.

Q. Don't you know?

A. I have no recollection distinctly about it. It was to be used for that and other purposes.

Q. Did you then intend to use it in obtaining this loan from the plaintiff?

A. I could not speak from recollection as to whether that is the true or not. I should have to examine the letters that accompanied it

428 and preceded it and followed it, and by examining them I could tell you.

Q. Can't you tell me without the letters?

A. I have not read them.

Q. When you wrote the appraisal you intended to use it with the plaintiff for the purpose of obtaining this loan, did you not?

A. I could not say; I don't remember the date of it.

Q. You can't say that you then intended to use it in obtaining this loan from Mr. Butler?

A. I don't, because I don't remember in point of time. My best recollection would be that I did.

Q. In your letter of Dec. 28, 1872, to the plaintiff, you say, "Enclosed is a proposed mortgage from me and my wife to you for $10,000, at three years, on my five upper quarries, and the appraisal of Edward W. Foater and Henry Watkins of all the quarry lots." Has that reference to the appraisal certificate mentioned?

A. It has.

Q. Was that enclosed in this letter?

A. I suppose so; I have no recollection about it at all. The letter would seem to indicate that.

Q. You used the appraisal for the purpose of obtaining this $10,000, did you not?

A. I did.

Q. Did you not intend so to use it when you wrote it?

A. My impression would be that I did.

Q. Did you not intend so to use it when you got Mr. Watkins to sign it?

429 A. I could not say positively, because I do not remember the order of time.

Q. What is your best recollection?

A. I suppose it was not signed until after it was written.

Q. What is your best recollection as to that?

A. As I judge from the correspondence the correspondence seems to indicate it was.

Q. Did you not intend to use it when you got Foster to sign it?

A. I think I did.

Q. You say you gave them a reason for wanting them to sign it?

A. I did.

Q. Did you tell them the truth?

A. I did.

Q. Was the pending business of plaintiff in your hands in 1874 that refer'ed on the 5th page of your letter to plaintiff dated November 28, 1872?

(Letter handed to witness.)

A. It is refer'ed to on that page of that letter.

Q. How early in 1873 did you fear that you would fail financially?

A. I cannot answer the question.

Q. Why not?

A. I could not tell you; it is so indefinite.

Q. The question, or your recollection?

A. The question is so indefinite.

Q. Did you fear it as early as August, 1873?

430 A. I could not answer the question, on account of its indefiniteness. The word "fear" is where the trouble comes. I do not know what you mean by that.

Q. I don't propose to explain it. Were you embarrassed for money to carry on your business in August, 1873?

A. I was.

Q. Seriously embarrassed for funds?

A. No; I think not. My present recollection is that I was not embarrassed at that time, as far as I can remember. Of course I can't give the exact time.

Q. Were you at that time trying to borrow money from the plaintiff for the defendants Foster and Watkins?

A. I think I was.

(Letter from witness to plaintiff dated August 19, 1873, shown witness.)

Q. Was the loan there asked for for your own use, or that of the defendants Foster and Watkins, or for all three?

A. One was for myself alone, and the other for them alone.

Q. You never had any difference with Foster and Watkins, had you?

A. Nothing of any consequence. I don't understand the question, quite. The point with me is whether it refers to to-day or that
431 time. If you will make your question point out that difference I will answer it.

Q. Will you answer the question now?

A. I have.

Q. As fully as you can do so?

A. No. I can go into details. Repeat your question you want answered.

Q. You have no further answer to make?

COUNSEL FOR DEFENDANTS. You can state whether you refer to the time of the letters or now:

A. I refer to the time of the letter.

COUNSEL FOR PLAINTIFF. Q. Have you ever had any matters of difference with Mr. Foster?

A. I have.

Q. What is the date?

A. I had some prior to the writing of the letter, and some since, but none of them of great importance.

Q. Matters of little consequence, were they?

A. Little consequence.

Q. Is it the same case with Watkins?

A. Except since then. I never had any before that I know of.

Q. Something since your financial troubles came up?

A. Yes. Nothing of any great importance. Perhaps I should add one thing in regard to both of them. I presume it grew more out of my fault than theirs; undue sensitiveness on my part as to their treatment of me. I presume it grew out of that, and I suppose I was more in fault than they.

432 Q. You are willing to make a proper apology?

A. Do wish that question answered?

Q. Answer it if you wish.

Q. In your letter of June 16, 1870, you say: "If you shall aid me to a position where I can recover my losses I will gladly accept it," and so forth; what kind of losses do you refer to there; do you remember?

A. I do.

Q. What kind of losses do you there refer to?

A. Pecuniary.

Q. Occurring where?

A. In New York City.
Q. In stock speculations?
A. Yes.
Q. What knowledge have you of any developments of the Falls lot as a quarry?
A. I hired a man to go in and open it and get some stone there.
Q. Open it in what manner?
A. By uncapping; taking off the earth and taking out stone; uncapping at the top or front edge.
A. I think both.
Q. How large at the top?
A. I could not tell you.
Q. How much in front?
A. You mean the exact number of feet or yards?
Q. About what width or proportion of the lot, or how many feet wide, or was it simply a strip exposed?
433 A. It was not large; it was a small excavation for the purpose of showing what the quarry was made of, to get more into it.
Q. No use was made of the stone, I suppose?
A. No, sir; not that I know of, that I got out, and I don't know but there was; but I think not.
Q. Who was that man?
A. A Peter Post. I think I had one or two men with him.
Q. At Pier'epoint?
A. Yes, sir; I think he had a man with him—a Frenchman. I have forgot his name now.
Q. Have you any knowledge of any other developement having been made in that lot—the Fall's lot?
A. I have not personally.
Q. Can you distinguish any place on the lot that shows sign of developement?
A. Do wish me to answer whether I can designate it here, or by going to the quarry?
Q. Whether you can designate such place in your recollection?
A. I can.
Q. Where is it?
A. According to my best recollection it is about the middle of the lot as you go up and down the river.
Q. On the river bank?
A. Yes, sir.
Q. How far from the bottom of the ledge?
A. I should say 20 or 30 feet.
434 Q. How large an excavation is indicated there?
A. Of course I am only giving my recollection, which must necessarily be somewhat vague. I should say perhaps 5 feet in width and perhaps 15 or 20 feet in depth, that is, up and down.
Q. Perpendicular?
A. Yes, sir.
Q. How deep into the ledge?
A. Some places, I should think, it was 3 or 4 feet.
Q. And other places less?
A. And other places less.
Q. Knowledge of your own how that hole came there?
A.
Q. You have no'?
A. I think I was there when he made a part of it, myself.

Q. Who made it?

A. Peter Post and the Frenchman. I can't recollect his name at this moment. I think, perhaps, there was another man. I think he had two men working, I am not certain; he had one.

Q. Have you any knowledge of any excavation on the ledge, except made by Post and those assisting him?

A. Not personal knowledge.

Q. Can you designate any other excavation there, can you, except what was made by Post and his assistants?

A. The whole quarry was out to view.

Q. I am speaking as to work in developing?

435 A. Not of my own personal knowledge.

Q. The Orchard lot; what developement do you know of upon that, if any?

A. I think we had better go to the Fall's lot and correct our answer. I think I know of more developement upon the Fall's lot from my personal knowledge, personal observation; it is visible right there now.

Q. Where is it?

A. I could not designate the precise spot, but the appearance of it indicates there has been stone taken off there.

Q. About where is the spot?

A. On the front edge, next to the river.

Q. In what portion of the lot as to northerly or southerly?

A. I could not point out the precise locality from recollection.

Q. What point between the top and bottom of the ledge?

A. I think it extends all up and down, from the top to the bottom it indicates that stone had been taken off from there.

Q. A long time ago or recently?

A. I could not say all I can say, is there is stone and evidently some have been taken off.

Q. How do you judge some have been taken off?

A. From the appearance simply.

436 Q. Can you tell whether they taken or whether they rolled down to the river?

A. I could not.

Q. Can you tell whether it was done by digging or thrown out by frost or water?

A. The whole line of the stone for 20 or 30 feet up is exposed to the weather on the east side; the whole front of the stone is exposed to the weather, according to my best recollection.

Q. And at some places you cannot tell where the stone looks different from the rest of the ledge?

A. I think pretty much all of it bears the impress or appearance of stone having been taken from it.

Q. Pretty much all of it?

A. I should think so, along the river.

Q. Then the whole front looks about alike, does it?

A. No; I should think not.

Q. Did not you have Post dig there so as to show the quarry and exhibit it?

A. I did on purpose for that.

Q. If other digging had been done there before, why did you have him do that?

A. Because I wanted to get into the interior of the quarry, and to see if it showed the same in there.

Q. The other was a mere surface digging then upon the edge?

A. It was upon the edge.

437 Q. Did not go into the interior so much as Post did?

A. Post made a digging in, of course having too sides where he was digging, and of course he penetrated into the stone more and ex'ibited its character more than could be seen from the outside.

Q. Was not all that Post did the taking off roots and moss, and earth and loose stones, so as to expose the face?

A. It was not, what do you mean by loose stones, if you mean loose stones that did not require to be dug out with a bar I say no, if you mean stones loose that could be dug out with a bar I should say yes.

Q. What appearance of developement did the Orchard lot ex'ibit?

A, Something the same.

Q. What appearance did it ex'ibit?

A. The stone was nearly perpendicular, I should think about 40 or 50 feet high, and exposed almost all the way from the top clear to the bottom; it was a little higher there than at the Falls lot.

Ques. Did you ever develop that quarry any?

Ans. Not any that I recollect.

Ques. Have you any knowledge that any one else ever did?

Ans. Not personally.

438 Ques. The Ben Cox quarry had been developed considerably?

Ans. It had.

Ques. At different times?

Ans. At different times.

Ques. Did you do any work in developing it?

Ans. I did.

Ques. When?

Ans. In the summer of 1873.

Ques. How much did you expend there?

Ans. Between $1,500 and $2,000, as near as we could make the account.

Ques. Of what money?

Ans. Not from any particular fund, except money that I had on hand.

Ques. Was it money you got from the plaintiff?

Ans. I could not tell you in regard to that.

Ques. Why not?

Ans. I don't know, I am sure.

Ques. Can't you remember that as well as you can the stone of the quarry?

Ans. What do you mean by that?

Ques. I am asking questions.

(Question read.)

Ans. I do.

Ques. What money did you use in this work?

Ans. I could not tell, in fact I did not keep any funds received from particular sources separate, all the funds I received were my own; it was not drawn from any particular fund.

Ques. Why did you leave that quarry?

439 Ans. Because we could do better elsewhere.

Ques. What did you do with the stone taken from that quarry?

Ans. I could not tell you; some of them we sold, but to whom I could not tell you.

Ques. How much did the stone sell for taken from that quarry?

Ans. I could not tell you.

Ques. Have you no idea about it?

Ans. No, I have not; well, yes, I have some idea about it.

Ques. What was it, as near as you can tell?

Ans. It was not near as much as we expended there in developing it, because we were then opening the quarry.

Ques. Not half as much?

Ans. I should think not.

Ques. Did you get $500 for the stone you expended from $1,500 to $2,000 in getting?

Ans. I did not expend $1,500 or $2,000 in getting those stone.

Ques. What did you expend it in?

Ans. I expended it in clearing away the débris of former excavations there and uncapping and getting away the trees and roots, and things that interfered with the more extensive working of the quarry.

Ques. Do you mean to say that you uncapped the top or any portion of the quarry.

Ans. I believe they did, I think I know they did.

440 Ques. Was not the excavation at the same spot where the jail stones were got?

Ans. I don't remember about that.

Ques. About the middle of the wall from top to bottom?

Ans. I don't remember about that; it was very near the same place, I think.

Ques. About the middle of the wall from top to bottom?

Ans. I think they took off some of the earth from the top.

Ques. Do you mean that you understand the excavation you made went to the top?

Ans. I think it did; that would be my best recollection in regard to it.

Ques. Can you swear that anything was dug from that lot except stones and the dirt?

Ans. O, yes.

Ques. Was there a defect in the stones that you took out?

Ans. There was in some of the stones.

Ques. Most of them?

Ans. I think there was.

Ques. Iron-rust spots?

Ans. Something that appeared like that.

Ques. Soft spots?

Ans. Yes, sir.

Ques. Making them valueless for commerce?

Ans. Not wholly.

Ques. Valueless for fine work—cut work?

Ans. Some of them, most of those we got out were.

441 Ques. You abandoned work there, did you not?

Ans. I did at that time.

Ques. Was it on account of the defect in the stone in part?

Ans. It was because the parties who wanted stone could not wait.

Ques. Was it not also because they were not proper stones for building-stones?

(Dep. 27.)

Ans. It was by digging farther in we got purer stone, and the parties in Boston could not wait until we could get it.

Ques. Do you state that you found good stones by digging in?

Ans. We did.

Ques. At that place?

Ans. We did.

Ques. Was it not a fact that you found that the good stones were exhausted as far as you went?

Ans. No, sir; my recollection would be right the other way—that there was an abundance of stone there, but we found some portion was defective, and parties in Boston that wanted them could not wait for us to proceed with it.

Ques. You got to the good stone, did you?

Ans. We got some good stone; they were neither all good nor all bad; but we got as far as we could in the limited time we had. It was deemed advisable not to pursue that digging any further, but
442 confine ourselves to one quarry.

Ques. Did you find a difference in the quality of stone in the same strata as you went into the wall?

Ans. I could not say that we did. I don't know that I quite understand your question; perhaps I do, too.

Ques. The same strata, the same layer, of the same leaf?

Ans. I could not say that; I don't remember; I was not conversant with anything more than the general appearance of the excavation; it was all done by the superintendent.

Ques. Do you mean to have us understand that the stone of the excavation grew better in the same layer and strata as you went back into the wall?

Ans. No, sir; I don't mean to carry any idea in regard to that, either ay.

Q. You don't know how that was?

A. I don't know how that was.

Ques. You do not know of your own knowledge that there was any improvement in the quality of the stone as you went in the wall, do you?

Ans. Not of my own knowledge, personally, although I was there repeatedly and saw the work going on.

Ques. Have you knowledge of any other excavation in the Ben Cox quarry than this; personal knowledge?

Ans. I have.

Ques. What?

4 Ans. Well, I was there as much as twenty-five years ago, when Mark Parmeter was getting out stone there.

Ques. For what purpose?

Ans. He told me at the time; I don't at this moment recall. It seems to me he was getting stones for the pillars—the columns in front of Elderkin's block.

Ques. At what point in the quarry?

Ans. I could not tell you; it was somewhere on the Ben Cox quarry.

Ques. Ne r or at this place you have spoken of developing?

Ans. My impression is it was a little above or a little below; I could not say which. It might have been the same one; I think it was not. I think it was either a little above or a little below.

Ques. Within a very short distance?

Ans. Within a few rods of it, I should think. In addition to that, I think I was there a good many years ago, when I was a boy. I think that *that* Judge Sanford was getting a lot of the stone for the county ail.

Ques. Have you knowledge of any other development of this quarry?

Ans. I don't remember anything; no personal knowledge of it.

Ques. The next quarry north is which?

444 Ans. The Hicks lot.

Ques. What knowledge have you of any work having been done upon that?

Ans. I have no personal knowledge of it.

Ques. There had sometime been some stone taken from there?

Ans. I understood taken to Lake Champlain.

Ques. Does the wall show any indication of it?

Ans. I think it does.

Ques. What portion, northerly or southerly of the quarry?

Ans. I could not tell you. I am not familiar enough with the edge of the quarry to tell you.

Ques. There is no excavation of any large size there?

Ans. Not very large; no, sir.

Ques. Something taken from the edge, I suppose?

Ans. Yes, sir.

Ques. Was that done over 25 years ago?

Ans. I don't know when it was done. I should think it was.

Ques. You noticed it in your excursions up the river, at other times?

Ans. Yes, sir.

Ques. That it must have been 25 years ago or more?

Ans. I think I learned it was as long ago as that from others.

Ques. Nothing done since, that you have any information of, on that lot?

Ans. No, sir.

Ques. The next lot?

445 Ans. That is the Meacham lot.

Ques. What have you knowledge of having been done upon that lot?

Ans. You mean in the way of quarrying?

Ques. Yes, sir.

Ans. There was some quarrying done about 1853, 1854, and 1855, I should think.

Ques. By whom?

Ans. By Mr. Meacham and myself; mostly by myself, however, at my expense.

Ques. What did you get there?

Ans. Well, they got some stone.

Ques. Cord-stone?

Ans. Yes, sir; and some good stone with it for building.

Ques. What building were they used in?

Ans. I don't think they were ever used in building that I know of never sold.

Ques. What was done with them?

Ans. I think they were left there; and I think part were taken down to the village and were sold for cord-stone.

Ques. What was done with the rest?

Ans. Left at the quarry.

Ques. And are there still?

Ans. I think part are; I think part have been taken away. I think they were taken away while I was working the quarry in 1873. I think some were taken away.

446 Ques. Were any of the stone ever used, to your knowledge, except for cord-stone?

Ans. I think they were.

Ques. Where?

Ans. I could not tell you to what particular customer they were sold. I think in 1873 some stone Mr. Meacham and I got out years before were taken and used in some of our sales; of course I may be mistaken about that; that is my best recollection. Where they went of course I have not the slighest idea. They might have gone to Boston or Albany, or any other place.

Ques. Can you tell what workmen selected them?

Ans. I could not; Mr. Hunt would know more about that than any one else. He was the man who did the superintending.

Ques. Unless were used say in 1873, were any ever used from that ledge except for cord-stone, to your knowledge?

Ans. I think they were. Some parties I think formerly came to me. I could not tell you who it was. I' seems William Parmeter—some man in that vicinity—came to me and got permission to go and get some stone.

Ques. Would you know what they did with it?

Ans. No.

Ques. Do you know they were used in building?

447 Ans. No; I could not say; they got my permission to use them.

Ques. You have no knowledge that they were used for anything but cord-stone?

Ans. I have no knowledge that they were at all. They simply got my permission to use them. I think they afterwards paid me a little for them; claimed they had used them.

Ques. That is all you know about it?

Ans. Yes, sir.

Ques. Has there been any other excavation upon this lot—the Meacham lot?

Ans. I don't know of any other; they had a road built in front of the lot.

Ques. I am not asking about the road.

Ans. That was built with some of stone got out.

Ques. With loose stone?

Ans. Yes, sir; refuse stone.

Ques. And the quarry has never been used since?

Ans. Not that I know of.

Ques. And never had been used before, that you know of?

Ans. Not that I know of.

Ques. The Hale lot has no stone upon it?

Ans. No; I don't say that it is not considered valuable, because there are so much more valuable.

Ques. Does the stone crop out on the Hale lot?

Ans. I think it does a little.

Q. There never has been anything done with it?

A. No; I think not.

448 Ques. It is not considered of value?

Ans. Not as a quarry lot.

Ques. The Parmeter quarry is the quarry upon that side of the river that has furnished the stone known in the market as the Potsdam sandstone, is it not?

Ans. In part.

Ques. Has any other quarry upon that side of the river furnished stone known in the market as the Potsdam sandstone except the Parmeter quarry?

Ans. It has.

Ques. What one?
Ans. The Clarkson quarry.
Ques. Any other?
Ans. Yes, sir; the Ben Cox quarry.
Ques. Any other?
Ans. Yes, sir; the Hicks quarry.
Ques. Where?
A. I think they were taken to Lake Champlain; I don't know that personally.
Q. Then you don't know it yourself?
A. No, sir.
Q. How long have you known of the Parmeter quarry being worked?
A. About 50 years.
Q. Have you any knowledge of any stone having been sent to market from quarries on the west side of the river, south of the
449 Clarkson quarry, except the Parmeter quarry, and a few from the Ben Cox quarry?
A. No.
Q. You spoke of the stone being used largely in Montreal, Canada, Ottawa, and other places; where was that stone obtained?
A. Mostly from the quarry on the east side of the river.
Q. Called what?
A. Well, no; because you say other places; other places of course includes all the world; stone that were sent to Montreal were got mostly from the quarry on the east side of the river.
Q. Called what?
A. Called the Sanford quarry.
Q. And the stones taken to Boston, Albany, Canton, Norfolk, New York, and Chicago, where were they taken from?
A. If you want I should confine myself to my personal knowledge——
Q. To what knowledge you have of it; you say they were used there; I want to know what you know where they came from.
A. I could not tell you where they came from. I saw them there myself; I saw them used.
Q. Saw them used in those cities?
A. Yes, sir; of my own knowledge. I don't know of what particular quarry they came from.
450 From what you know of the quarries and the stone used in those places, what quarries did they come from?
A. I didn't see any of those stones taken out of the quarry.
Q The question is from what you know of the quarries and the stone used?
A. No person can tell you from the appearance of the stone what quarry they came from.
Q. None of them came from the Clarkson quarry, did they?
A. I don't know.
Q. Have any stone been taken from the Clarkson quarry for the market within the last 10 or 15 years?
A. Not to my knowledge.
Q. Have any from the Falls lot?
A. Not to my knowledge.
Q. Have there from the Orchard lot?
A. Not to my knowledge.
Q. Have there from the Hicks lot?
A. Not to my personal knowledge.
Q. Have there from the Meacham lot?

A. I think there have.
Q. What, and used where?
A. I could not tell you; they were used in filling orders which we had.
Q. Taken by Hunt, as you before stated?
451 A. Yes, sir.
Q. And that is all?
A. That is all, if you mean by the market the market outside of the locality in which the quarries are situated.
Q. You spoke of the market in your direct examination.
A. The market is where they sold the stone; you mean the market outside of the quarries?
Q. I mean the market you refer'ed to.
A. That is the sense in which I took it.
Q. Has not the quarry known as the old Parmeter quarry, and marked No. 7 upon your copy of the certificate of appraisal, furnished the most of the stone for the market sold for the last 10 years?
A. I think not.
Q. What quarry has then?
A. I think the Sanford quarry has—but of course I speak only from recollection—if the Montreal sales were included within the 10 years, but whether they are or not I could not say; if they were not, then the Parmeter quarry has furnished the principal amount of stone that has been sent to market. If those Montreal sales were within 10
452 years, then the Sanford quarry has furnished as much—or not as much perhaps, but a very material portion of it.
Q. The Sandford quarry and the Parmeter quarry have furnished substantially all the stone that have been sold in the market for the last 10 or 15 years as Potsdam sandstone?
A. Yes, sir; that is, as I understand; I don't know of my own personal knowledge.
Q. For the past 5 or 6 years the Parmeter quarry has furnished them all?
A. Pretty much all; we got some from the Post lot, and some from the Meacham lot, and some from the Cox lot.
Ques. As you have stated?
A. Yes, sir.
Ques. Of whom did you purchase the Falls lot?
A. Benjamin Cox.
Q. When?
A. I think about 1856 or 1857.
Q. At what price?
A. I bought it as a part of his farm.
Q. You bought it by the acre then?
A. I did.
Q. How much an acre?
A. I think it was a lump bargain; the *same* for the whole farm including that.
Q. How much was it rated at per acre?
A. It seems to me about $45, if I recollect right.
Ques. Per acre?
A. Yes, sir.
453 Q. That included to the middle of the river?
A. It did.
Q. And you paid nothing separately for the water-power on the ledge?

A. No.
Q. About how many acres is there in this lot?
A. About 8.
Q. And it cost you about $40 per acre, including water-power and lot?
A. No.
Q. That is what you paid for it?
A. No.
Q. It didn't cost you that?
A. That is not the price of it.
Q. You bought it with the rest of the farm, by the acre, did you not?
A. I did.
Q. Was any separate bargain made for the lot?
A. There was not.
Q. Did you not sell enough land off the rest of the farm to pay the purchase price of the whole of it?
A. Nearly enough, I think. I could not say positively in regard to that.
Q. When did you purchase the Orchard lot?
A. I think I made a conditional bargain for it about the same time—1866.
Q. Did that conditional bargain continue and merge into the contract finally made?
A. It finally resulted in that.
Q. When was that contract made?
A. Which one; the original one?
Q. Yes; the contract under which you held it in 1872?
454 A. I think that was along about that year, 1871 or 1872, the final contract.
Q. What was the purchase price of that lot?
A. It was changed. I think originally it was $2,000, but finally I got it for $1,000.
Q. You finally purchased it for $1,000?
A. I think I did.
Q. How many acres?
A. Four.
Q. Was the contract to purchase by the acre?
A. I think not.
Q. At so much for the whole lot?
A. Yes, sir.
Q. Including any buildings?
A. No.
Q. But including the land from the road to the middle of the river?
A. Yes, sir.
Q. At $1,000?
A. Yes, sir.
Q. Was that the purchase price of it?
A. It was.
Q. When did you purchase the Ben Cox lot?
A. Same time that Falls lot was purchased; it was part of the same purchase.
Q. It was part of the farm purchase?
A. Yes, sir.
Q. And went in with the farm and Falls lot at $40 per acre?
A. No.

Q. Didn't it go in as a part of the farm?
A. It did.
Q. Was any separate conveyance made of that lot?
A. There was not.
455 Q. Was it paid for together?
A. It was.
Q. Was it computed with the Falls lot and the farm in making up the number of acres purchased?
A. It was.
Q. Was any separate price set upon the Cox lot?
A. There was not.
Q. And you sold enough off from the farm aside from these two lots to pay substantially the whole purchase money of the purchase, did you?
A. I think not. I think, on further reflection, I didn't sell a much as that.
Q. How much did it lack of it?
A. My opinion is that the whole farm cost me $3,000, and that I sold about $2,000 off from it aside from these two lots; I am not certain about that.
Q. That is your best recollection?
A. That is my best recollection about it; I have not looked the matter up.
Q. Was it $40 or 45?
A. $45; when you say $40, I say no.
Q. You purchased at $45 an acre?
A. I think it averaged about that.
Ques. Including the farm and these two quarries?
A. Yes, sir.
Q. When did you purchase the Meacham lot?
A. I purchased one-half of it in the fall of 1854.
456 Q. And the balance?
A. I think somewhere from 1860 to 1865, as near as I can recollect.
Q. What did you pay for the one-half first purchased?
A. $500.
Q. What did you pay for the one-half last purchased?
A. I think it was some $600 or $700.
Q. And these two items cover this, the cost of this lot to you?
A. Yes, sir; that is, the purchase cost.
Q. When did you purchase the Hicks lot?
A. It was at two purchases; the first one about 1868, I should say.
Q. What portion did you then purchase?
A. The right to quarry there.
Q. From whom did you purchase it?
A. From a man by the name of Havens, in Essex County, in New York.
Q. What did you pay for the right to quarry?
A. I think $25; I don't know but that it was $50; it was some small sum.
Q. It was an unlimited right, was it not?
A. Yes, sir.
Q. To dig and remove stone from any ledge upon that lot?
A. Yes, sir.
Q. From whom did you purchase the lot?
457 A. I bought it either from Alexander Bradley or else the per-

son he sold it to. I think it was not from Bradley. Bradley sold to a Methodist minister up there. I can't give you his name. I purchased from the man that Alexander Bradley sold to.

Q. About when?

A. I think that was about 1870.

Q. Was it Harvey Wood?

A. Yes; Harvey Wood.

Q. What did you pay him for the lot?

A. I think about $300, if I recollect aright.

Q. How many acres are there in the lot?

A. I think 12 or 14; something like that; perhaps 14.

Q. That lot cost you, then, in all about $325 or $350?

A. Yes, sir.

Q. And that is all?

A. That is all; that is the purchase price.

Q. Your former price that you asked for the Meacham lot was $300, was it not? *Q.* Previous to 1871?

A. I think it was from $600 to 800. I don't know but what I did ask as high as $1,000; my impression is I offered it as low as $800.

Q. Before 1871?

A. I couldn't say in regard to that.

Ques. Did you ever make any improvement upon any of these lots except the work done upon the ledges, as you have stated?

A. I did.

Q. What?

458 A. There was some slight improvements made upon the Meacham lot, I think; made in the way of repairing a house and barn, fences; they were slight, but still they were improvements. I made some little additions in the way of fences and trees, &c., on some of the other lots.

Q. Which?

A. I think the Falls lot and the Ben Cox lot.

Q. Any other improvements?

A. You mean at one time; do you confine yourself to any time?

Q. At any time except the work upon the quarries that you have mentioned.

A. I built a shop for the workmen upon the Parmeter quarry.

Q. I am asking you as to the quarries we have been discussing; confine your answer to the quarries south of the Hale lot.

A. What is your question?

Q. What other improvements did you make on them that you have not mentioned?

A. I don't remember any.

Q. What be the cost of all these improvements?

A. It would be very slight.

Q. Less than $100?

A. I should judge so, all told.

Q. You say you took out stone in value at the cars, in the year 1873, about $60,000 worth?

A. I did not.

Q. What was that?

A. About fifty.

459 Q. Did that include labor?

A. The question is not an intelligible one.

Q. Did that $50,000 include labor?

A. The question is neither intelligible or intelligent.

Q. Did that amount include cut work?
A. It included the amount of cut work I put upon it.
Q. Did anybody else put any cutting upon it?
A. They did.
Q. Afterward?
A. They did.
Q. That it did not include?
A. It did not.
Q. Was considerable of this stone cut in the quarry ready to be used?
A. It was.
Q. For arches, for doors?
A. Cut ready to lay, like this stone here.
Q. Window-caps, water-tables, and ready for use?
A. Yes, sir; all sorts of ornamental work like that on the building opposite here.
(Dep. 32.)
Q. And that and the cost of hauling from the quarry went to make up this $50,000?
A. Those were elements of course in the cost of the stone.
Q. Were they part of this expenditure of $50,000?
A. My impression is the statement was that I expended from $40,000 to $60,000. When I sold the $50,000 worth of stone I had a good deal of stone on hand.

460 Ques. Does this cost of cutting stone and labor, and the cost of hauling to the depot, constitute any part of the $50,000 you mentioned?

A. Undoubedly it did, if I understand your question.
Q. Do you mean the $50,000 was the value of the stone at cars?
A. I mean just that.
Q. Or do you mean it was expense you had put upon the stone?
A. No; I mean just that it was the value of the stone delivered on the cars; that is the way we reckoned our sales; when we delivered stone upon cars that was the end of it. We regarded that as a sale, and reckoned it that way that year. We sold about $50,000 worth of stone, which was all I intended to sell when I started the quarry that year.
Q. That, then, included the stone in its original state; all the work put upon it and such profits as were made?
A. Yes, sir.
Q. You speak of your business being very prosperous previous to the commencement of the stone-quarry business; you mean previous, do you not, to the stone-quarry business?
A. Yes, sir; subsequent to, for that matter.
Q. What time do you refer to?

461 A. I did not refer to any date. Mr. Russell asked in 1872—— Mr. PARKER. From what sources did you derive your income in 1872?

A. My legal practice, my practice as agent for loaning money, and the income from my property.
Q. Can you tell how much your income was for that year?
A. Not accurately.
Q. Approximately?
A. Well, I never footed it up accurately. I could not tell exactly at that time, and, of course, I can tell less accurately now from want of recollection, and not being able to recall things which then I would base judgment upon. But still I can give an opinion upon that.

Q. Have you any definite recollection as to what your income was that year?

A. I think it was from $3,000 to $6,000.

Q. What was your expenditure for that year?

A. Probably $2,500; perhaps $3,000.

Q. You were paying a large amount of interest at that time, were you not?

A. I was.

Q. You say your law library cost you $2,000? Q. Did you sell that about January, 1874?

A. I did.

Q. For how much?

A. I think all I got for it was between $500 and $600.

Q. You sold it for that price, did you not?

462 A. I did.

Q. At this time there was pending against you in progress a suit in behalf of the heirs Zenas Clark—against you as executor of that estate?

A. There was.

Q. It afterwards went to judgment?

A. I think not. There has never been a judgment that I am aware of.

Q. It was reported on by a refferee, was it not?

A. It was. Perhaps that question ought to be modified. It was not a suit against me particularly; it was a suit in which all the parties were involved. I represented a large part of the parties, the heirs to the estate.

Q. You were one of the defendants?

A. Yes, sir.

Q. Did the findings of the referee upon the trial of the case show you largely deficient in your account with the estate?

A. No, sir; not a dollar of deficiency.

Q. Not with the heirs?

A. No, sir; not one of them. On the other hand, they were overpaid. I lost several thousand dollars by them.

Q. By the report of the referee?

A. No; by my overpaying the heirs.

Q. Does the report of the referee show it?

A. Show what?

Q. That there was no deficiency.

463 A. Yes, sir; it does not show one way or the other, as far as that is concerned; it does not show any deficiency against me.

Q. You have read the report?

A. I have what purported to be that. I read the report itself.

Q. Does it not in effect show that there is a large amount against you in the interest of the estate and its representatives?

A. No, sir; not a dollar. There is no such deficiency. The boot is right on the other leg.

Q. You say in your direct examination that you didn't go on with the stock company in December, 1872, or January, 1873, because you were not able to compete as you desired. What was the difficulty?

A. Mr. George F. Paddock, of Watertown, had agreed to go in with me and furnish part of the money for carrying it on, and when I went to him in the spring to do it he wanted to defer it until the first of July, so that necessarily deferred the organization. When it came to the first of July, in 1873, the stringency of money matters came on and

he wanted to defer it still longer, and that was one of the principal things that embarrassed me. I was expecting $10,000 from him to carry on the business with.

464 Q. When was the certificate of organization written?

A. I think it was written at an early day; along in the early part of 1873.

Q. How early?

A. Well, I couldn't say how early. I think along about the time we commenced business, if I recollect right. I should think March. I don't know but it was before March.

Q. Had there been previous negotiations in regard to forming a stock company?

A. There had.

Q. Commencing about when?

A. I should think about 1855 or 1856.

Q. What was the company finally organized called?

A. The Potsdam Sandstone Company.

Q. When did the negotiations for the formation of the company commence?

A. That was the culmination of all the previous negotiations in regard to it.

Q. When did the negotiation for the formation of the company commence?

A. The negotiations began about 1855 or 1856, and was kept along with varying attention, sometimes more and sometimes less, until it finally culminated in the organization of this company.

Q. Was there a negotiation done upon the subject in 1862, in the formation of this company, the Potsdam Sandstone Company?

A. I think there was.

Q. Was there in 1871?

465 A. I think there was.

Q. Who were the parties constituting the company when it was organized?

A. There was De Marquis Parmeter, Henry Watkins, E. M. Foster, Charles Cox, and myself, S. B. Gordon.

Q. The Foster, Watkins, and yourself being the defendants in this action?

A. Yes, sir.

Q. When did the negotiation commence as to the formation of this company with Mr. Watkins?

A. Well, my best recollection would be it was done some years before. It had been with him as it had been with some others, a subject of frequent conversations.

Q. How many years before?

A. I couldn't speak with any definiteness about it.

Q. Before 1871?

A. I think so. It had been discussed with a great many people. For that reason I could not distinguish what was with him and what was with others.

Q. Was it discussed with him in 1870?

A. I think it was.

Q. And in 1872?

A. I think so.

Q. And at different times in 1872?

A. I think so.

Q. With a view to the formation of this stock company which was finally orgnized?

A. I couldn't say that; it was with a view to organize a company to work and develop these quarries.

466 Q. The same thing occurred with Mr. Foster?

A. The same.

Q. What time was this company, the Potsdam Sandstone Company, by that name, negotiated upon and considered between you?

A. You mean by "you" who?

Q. Yourself, Watkins, and Foster.

A. The negotiations for the formation of a sandstone company had been continued for a great many years, and when this particular name was agreed upon; I couldn't tell you my impression is that from the first we had thought of calling it that company.

Q. Had you and Mr. Foster and Mr. Watkins negotiated together in they ear 1871 as to developing the sandstone business in some company to be formed?

A. I think we had.

Q. And through the season of 1872?

A. I think we had.

Q. Had you previous to 1871 frequently negotiated and discussed the matter?

A. I had.

Q. With both of them?

A. I am inclined to think so; it is only a general recollection, the same as 1870 and 1871.

Q. Did you first call the matter to Mr. Watkins attention, or he to yours?

A. I did call his attention to it, as I had dozens of 'thers.

467 Q. I am only askingy ou as to him.

A. In order to get a correct understanding to my own meaning, I ought to say I talked with him as with others; I was the moving man in all of this matter.

Q. Did you introduce the subject to Mr. Foster's attention?

A. I did.

Q. The subject of the formation of the company and the working of the sandstone company?

A. Yes, sir.

Q. How early?

A. I am unable to distinguish; I had been talking along from 1854 or 1855.

Q. To him?

A. I cannot distinguish that I talked with him.

Q. As early as what time?

A. I don't think I could give you any more definitely than that.

Q. Did you before 1870?

A. I did some years before.

Q. And it continued from time to time, as you met, until the company was formed?

A. Yes, sir.

Q. Why was the company not formed before 1872?

A. Because I couldn't command the means to form it, to carry on the business.

Q. What do you mean by means?

A. Money means.

Q. How were you enabled to organize the company in 1873?

A. Well, I obtained this loan from Mr. Butler of $10,000, and I had a promise from George F. Paddock by which I expected $10,000,
468 which would make $20,000, all I wanted.

Q. The money you didn't get from Paddock?

A. I did not.

Q. You commenced by obtaining the money in controversy from Mr. Butler, the plaintiff?

A. Yes, sir.

Q. And without that money you couldn't have commenced, could you, or without have organized the company?

A. Probably not, unless I got it from some other source; I couldn't unless I got money from some source.

Q. You know of no other source you could obtain it from them?

A. No, probably not; I don't know that I knew of any other source; I knew other monied men.

Q. No source that you could obtain it from to develop this business?

A. Not that I know of, because I had made no definite arrangements; of course there was no source from anybody until I had made some arrangement with them.

Q. Was there any written memoranda as to the formation of the stock company previous to the acknowledgement of the certificate previously filed?

A. According to my best recollection, there was.

Q. Was this memorandum written?

469 A. I think it was written a very short time before that.

Q. How long?

A. I couldn't tell you. I have no distinct recollection about it.

Q. A few months?

A. I should not say more than a few days or weeks, at the outside.

Q. Was it signed by any one?

A. I think it was signed. It purports to have been signed at that time. That was my recollection of it. I see there was an acknowledgment put to it.

COUNSEL FOR DEFENDANTS. He is speaking of the written memorandum before this was signed.

WITNESS. I don't think there was any before this.

COUNSEL FOR PLAINTIFFS. Q. This paper was written and signed a few weeks or days before it was acknowledged, was it?

A. No; I think it was about that time. I should say not more than a day or so before, or perhaps a few weeks before. I think about that time.

Q. Was there not a memorandum written, signed, or undersigned, purporting to form such a company, previous to the writing of this?

A. I don't remember any such. Perhaps you can recall my recollection.

Q. I say previous to the writing of the certificate filed.

A. I have no present recollection of any such thing.

470 Q. Who were the officers of the company organized?

A. I was the pres't, Henry P. Foster was the secretary, I or J. P. Hunt was the superintendent, and the trustees or directors were Mr. Watkins, E. W. Foster, Parmeter, Cox, and myself. S. B. Gordon.

Q. Watkins and Foster being of the defendants in this case?

A. Yes, sir.

Q. And H. P. Foster being a son of E. W. Foster?

A. Yes, sir.

Q. Had you from time to time previously made written plans of organization, in blank as to signature, and submitted them to Foster and Watkins?

A. Previous to what?

Q. Previous to 1873.

A. I don't remember. I think not. I don't speak with positiveness about it.

Q. Had you made written memoranda suggesting a scheme of consoldidating and organizing the quarries and ledges mentioned, to be used together?

A. To Foster and Watkins?

Q. To any one previous to 1873.

A. What quarries mentioned do you mean? You have mentioned all sorts of quarries.

Q. Any of the quarries.

A. I think I had made one embracing all the quarries on both
471 sides of the river; all quarries that existed there in that locality.

Q. Had you not from time to time changed that?

A. I don't remember. I presume so. I had it under negotiation for years and years.

Q. Did you not submit such claim to Mr. Watkins?

A. I have no recollection.

Q. For his consideration, in the winter of 1871-1872?

A. I have no recollection of it. Possibly I did.

Q. Didn't you submit such a scheme to George Richards in the winter of 1871-1872?

A. I have no recollection of it; and still I have a faint impression of something of the sort, but it don't amount to a recollection.

Q. Did you not more than once submit to George Richards a project for organizing the quarries?

A. I think I did.

Q. Did you not submit the same project to Henry Watkins?

A. I don't remember. I don't remember whether it was written or not. I recollect talking to Richards repeatedly about it.

Q. Can you say you did not submit the same project to Watkins?

A. I could, but I wouldn't, because I have no recollection about it; that is, I have the physical power to say so.

Q. Don't you remember that you repeatedly put memoranda
472 upon paper of your scheme of organizing the quarries on the west side of the river, above the Parmeter quarry, with the Parmeter quarry, and forming a stock company out of them?

A. I did.

Q. Did you not submit that scheme and memoranda to George Richards?

A. I think I submitted a scheme to him, but whether in writing or not I couldn't say. My impression is it was in writing.

Q. Did you not submit it to Watkins?

A. I don't recollect it distinctly. I can gave you an impression in regard to it.

Q. Your best recollection?

A. It don't amount to a recollection.

Q. What is your best impression about it? Q. Have you an impression as to the fact upon your mind?

A. It would be more a matter of reason than recollection, but Rich-

ards I recollect, because he was a new man. I have no recollection of it.

Q. You made such memoranda and you talked with Mr. Watkins about the scheme, did you?

A. I did; that is, I talked with him about the quarries—the organization of the quarries.

Q. The scheme that I have mentioned?

473 A. I can't say it was any particular scheme. I couldn't limit in that way.

Q. But a scheme for organizing quarries?

A. Yes, sir; repeatedly talked to him about it.

Q. And also with Mr. Foster?

A. Yes, sir.

Q. Do you remember presenting this written memoranda to either of them?

A. I don't; I don't remember presenting it to any one except Richards. I think I remember presenting the subject to Richards.

Q. Can you remember so as to say you did not present it either of them?

A. No, sir.

Q. During this negotiation it was understood between you and Henry Watkins and Edward W. Foster that when this company should be organized that they would have some of the stock in it, or would take some?

A. What negotiation do you refer to?

Q. I require an answer to the question.

A. I couldn't answer until I know what negotiation you refer to.

Q. Isn't that question sufficiently definite?

A. No; I don't know what negotiation you refer to.

Q. What answer do you make?

A. I couldn't answer till I know what negotiation you refer to. I have been talking of negotiations from 1854 to 1873.

474 Q. In the talk had with Watkins and Foster previous to 1873 was there any understanding with them that if the company should be organized they would take some of the stock?

A. I think there was.

Q. Was that as early as 1870?

A. No.

Q. In 1871?

A. No.

Q. How early in 1873 was it?

A. I think it was in December, 1872. I am a little in doubt as to whether it was in December, 1872, or January, 1873; but I finally obtained their consent to take some interest in it. My present recollection is it was about that time, about the 1st of January, 1873.

Q. The subject of their taking stock, then, had been discussed between you previous to that?

A. I think not in the words "taking stock," but taking an interest in them; that is the way I always talked with these people.

Q. The subject of their taking an interest in the stone company business, if it should be organized, had been discussed between you three previously?

A. I think your question implies a wrong manner; not in regard to the company, but in regard to the developing of the quarry—taking an interest in the development of the quarries.

475 Q. Their taking an interest in the developing of the quarries had been talked between you three before December, 1872, had it?

A. It had been talked of by me to them.

Q. Didn't they answer you?

A. Well, they did in December, 1872, or January, 1873.

Q. It hadn't been talked of between you three previous to December, 1872?

A. About their taking an interest in the development of the quarries it had.

Q. That is it.

Q. You mean that I should confine it to us three?

Q. I ask if it had been talked of between you three?

A. I had talked of it to them, each of them separately, and possibly together; I don't remember about that. I urged the matter upon their attention.

Q. Repeatedly?

A. I had.

Q. How early in 1871 had you?

A. I think so.

Q. And in the winter of 1871 and '72?

A. I think so.

Q. And from time to time during the summer season of 1872?

A. I couldn't say definitely about that; I think not in the summer; it was more in the fall and winter. After the summer once opened business began. I don't think I talked of it to them then. I might casually have done so.

476 Q. Mr. J. P. Hunt was your superintendent, you say?

A. Yes, sir.

Q. Did he have charge of the men at work in the business?

A. He did.

Q. How came he to come to Potsdam and become connected with the business?

A. When the normal school was built.

Q. At whose request?

A. Mine; I engaged him at that time. I think, in 1868 or 1869, when the normal school was built, I told him when I got to working the quarries that I wanted him to come and superintend them. I had observed his work on the normal school, and thought he was an efficient man. He told me he would come, and I afterwards wrote to him.

Q. When was that?

A. I should think in December, 1872, or January, 1873; he was away in Canada, op'osite Vermont.

Q. Did he come?

A. He did.

Q. He came in November, did he not?

A. That is earlier than I thought; it may be; my recollection is that it was in December or January.

Q. Did you engage him to come previously?

A. No; I simply wrote to him. I told him that he had prom-

477 ised to come when I wanted him, and now I wanted him to come.

Q. In your letter to plaintiff of November 30th, 1873, you say, "I have a capable and experienced quarryman as foreman, at $5 per day and board;" does that statement refer to this man Hunt?

A. It does.

Q. And to your engagement of him?

A. It does.

A. I suppose so from seeing it in the letter.

Q. Do you remember that he came to Potsdam about the middle of January?

A. I think he did.

Q. The 14th of January?

A. I couldn't say about that. It was along sometime in January or February. My impression is January.

Q. He came at your request?

A. He did.

Q. Stopped at the American House, did he not?

A. Yes, sir.

Q. Hunt had an interview at your office with you?

A. Yes, sir; forty of them.

Q. At that time?

A. Yes, sir; every day as long as he stayed, about three weeks.

Q. Was he there at your office on the evening of the 16th of January?

478 A. I couldn't say about that.

Q. Was he there about every evening while he was there?

A. I couldn't say about that.

Q. Do you remember the fact of his going up to the quarry and taking a list of the men's names and the prices they were paid about that time?

A. I do not.

Ques. While he was there?

A. I do not. Now you speak of it, it seems to me I remember something of it.

Q. That he did?

A. It seems as if there was something of the kind. Still, I couldn't say about that.

Q. Did he not, while there, have an interview with you in your office, at which Mr. Foster and Mr. Watkins, among others, were present, in regard to his working in the business?

A. I have no recollection of it.

Q. Can you say it was not so?

A. No, sir.

Q. Do you remember that he was in your office and consulting you as to the work in the sandstone business when Watkins was present?

A. I have no recollection of any distinct interview. I suppose of course he did. I don't recollect it.

Q. Is it the same case as to Mr. Foster?

479 A. The same. I don't remember an interview with either distinctly.

Q. Still they were frequently in there talking about this business, were they not?

(Dep. 37.)

A. I couldn't say that.

Q. You can't say they were not there while he was there, one or both?

A. I think they were, although I can't recall a distinct interview; at least one of them was there.

Q. Which one was that?

A. Watkins.

Q. You can't say the other wasn't there, can you?

A. No.

Q. How early in January was it that Hunt was there?

A. I don't remember.

Q. In your letter to plaintiff of January 21st, 1873, you say, "Mr. Hunt, my boss-quarryman, is here at work, and we have put a larger amount of stone on the railroad-depot grounds, and shall continue to do so;" do you now remember if that was correct?

A. I think it was; that is according to my recollection.

Q. He was at work there previous to the first?

A. I think he was; that accords with my recollection of it.

480 Q. In your letter to plaintiff, dated November 7th, 1872, you say, in relation to the borrowing of $20,000, "I would prefer to get the whole from you, one or both of you," referring to Mr. Duncklee and plaintiff, "but what I do not get from you I will try to get from other parties, unless I sell stock, which I will endeavor to do." Who were the other parties there referred to?

A. Other parties who had the money, who might be found who had the money.

Q. Did you mean to include Mr. Watkins as one of the parties?

A. I did not; or Mr. Foster, or any other individual. It was a general expression for other persons.

Q. You meant no one in particular?

A. Not that I know of.

Q. You meant a class of persons that might include them?

A. Yes, sir; it was an expression to include everybody except Mr. Butler and Mr. Duncklee.

Q. Did you intend to include any except those you had negotiated with about the stone business?

481 A. I had no meaning about it further than it included everybody but the two whom I was addressing.

Q. Did you intend to include everybody except the parties you had negotiated with in regard to the stone business?

A. I don't know how to answer your question.

Q. Did you not intend to include those you had negotiated with about the stone business?

A. It was an expression which included everybody except Mr. Butler and Mr Duncklee; I don't think it pointed to any one in particular, more than that.

Q. In your letter to plaintiff dated November 30th, 1872, you say, "I shall adopt your suggestion, and work the quarries myself pretty moderately alone, except in case of parties to whom I am pledged to let in for some small interest, if they shall still want it." Did that include Mr. Foster and Watkins?

A. I think it did.

Q. In your letter to plaintiff dated November 30th, 1872, you say to him, "What I do not get of you I think I will get of Cox and

482 Watkins and others, by letting them have some of the stock of the company; we shall form after giving you the mortgage." Did that refer to Watkins, the defendant?

A. It did.

Q. And the word "others" included Foster, the defendant?

A. It would.

Q. In your letter of November 30th, 1872, to plaintiff you state, in relation to organizing a stone company "I am under some pledges to parties to let them have stock, and an interest, if they persist in it." Did you there refer, among others, to the defendants, Foster and Watkins?

A. I think so.

Q. In your letter to plaintiff dated February 21st, 1878, you say, "I have done nothing about organizing a quarry company, but have agreed to organize one with $150,000 capital; to allow Watkins to take $6,000 at 50 per cent.; Foster, $6,000 at 50 per cent.; Parmeter, $15,000 to $30,000 at 50 per cent." Are the Watkins and Foster there referred to the defendants in this action?

A. They are.

Q. Was the fact there stated true as stated?

A. It was.

Q. You say in the same letter, "I offered Cox $6,000, which he would take if I would let him take $20,000 more, which I would
483 not do. Foster and Watkins each wanted to take $10,000. I wanted them to take $5,000 each, and we compromise, on $6,000 each?" Is that statement as to Foster and Watkins correct?

A. It is.

Q. In your letter dated, April 8th, 1873, to George F. Paddock, of Watertown, you say, "When I went to Watertown and New York, last month, a part of my business was to determine which one of the several parties with whom I had been negotiating would be one outside of our village associated with us." Does that refer to the stone company and its business?

A. It does.

(Dep 38.)

Q. Are the parties not outside of the village intended to include Foster and Watkins?

A. It was.

Q. Previous to 1873 had you ever loaned Mr. Foster or Watkins, or either of them, any money?

A. I think I had; both of them.

Q. When, and, what amount?

A. I could not tell you the amount, nor the times I could not speak with positiveness.

Q. You can't specify any time or amount?

A. No; without a little further reflection upon it. I think I might by thinking of it.

Q. About what was the date of the election of assignees in the Hitchings and Brown matters?

484 A. My impression is about the latter part of 1872 or fore part of 1873.

Q. Was it November, 1872?

A. Perhaps it was.

Q. You were present at the time of the election?

A. I think I was.

Q. As attorney for Foster and Watkins, the defendants?

A. My impression is not; I think I represented some New York creditors.

Q. Are you confident about that?

A. Yes, sir; I think I represented some New York creditors I don't remember representing Foster and Watkins, because I think they were there themselves.

Q. Did you not state that you appeared for them there, and urged the acceptance of the proposition for a sale of the store-goods to the highest bidder, which resulted in their purchase of the property as co-partners?

A. I have no recollection of such a thing.

Q. You don't remember whether it was or not?

A. I do not; possibly you might recall it by repeating some of the details.

Q. That same fall Foster was a member of the constitutional commission sitting at Albany?

A. He was a member of that, I think, it was that fall or winter; yes, I will say.

485 Q. You had charge of his business while he was gone—financial business?

A. I advised him and Watkins in regard to the Hitchings and Brown matter. I was their legal adviser.

Q. During his absence in December, 1872, did you not have charge of Mr. Foster's business relative to all of these matters and his other legal business at home?

A. Not quite as broad as that.

Q. How broad?

A. As broad as to include the Hitchings and Brown matter. I was the adviser of him and Watkins in regard to that.

Q. In November and December, 1872, were you not?

A. I was, I believe.

Q. Did you correspond with Foster during his absence at the commission?

A. I think so.

Q. And in relation to marketing of stone to the capitol commission?

A. I have no recollection of that.

Q. Can you say you didn't?

A. I can't; I was at Albany while he was there.

Q. Do you know De Marquis Parmeter?

A. I do.

Q. And have known him for 40 years?

A. Yes, sir.

Q. More?

A. Yes, sir.

Q. He is an expert in the sandstone business as quarryman?

486 A. Yes, sir. He has been at the business a great while.

Q. He is more experienced than any other person you know of, isn't he? Q. He is a man of great experience?

A. Yes, sir.

Q. You purchased the old Parmeter quarry, so called, from him?

A. I did.

Q. At a cost of about how much?

A. I don't remember what the purchase cost me. I couldn't tell you. I don't remember.

Q. Was it $11,000?

A. I think it was in the neighborhood of $11,000, but I think it was more.

Q. Including tools, derricks, stone got out of the quarry and in process of manufacture?

A. I think I had to pay him for that extra.

Q. In addition to the $11,000?

A. I think so.

Q. Is that your best recollection about it?

A. I think it is; still, I don't speak positively; I recollect getting the price of it afterward.

Q. Do you recollect having in your possession at one time two notes

made by him, one for $2,000 and one for $3,000, understood to have been given in adjustment of Montreal stone matters?

A. I had some notes; I don't remember the amount, but in some such amounts.

Q. Two notes?

487 A. I don't remember whether it was in one or two; the impression is in one.

Q. The note or notes being how much?

A. I should say about $3,000; one note if it was one, or two if two.

Q. About when did you first see those notes?

A. I could not tell you.

Q. About what year?

A. Well, I could not answer that; I don't know; but I saw them about the time they were made.

Q. Did you?

A. I know he advised with me about the matter; what papers he showed me I could not tell you.

Q. What I want to get at is whether you saw them about the time they were made?

A. I could not say; I was advising him legally.

Q. You saw them some time?

A. Yes, sir.

Q. In Parmeter's possession?

A. I never saw them in his possession after they were delivered; I don't know that I did before; I don't remember about that.

Q. In whose possession were they when you first saw them?

A. I can't say whether it was in Watkins' or Foster's or Hitchings'; I could not tell you.

Q. Were they in the hands of one of them?

A. I should say so, according to my best recollection, although I have no definite recollection about it.

488 Q. Did you see them after that again after you first saw them?

A. It seems to me I did, but I don't remember definitely about it.

Q. Did Mr. Foster have any stock of the Potsdam Sandstone Company?

A. He did.

Q. How much?

A. I could not tell whether $3,000 or $6,000. My impression is it was $3,000. There is something in the letters that would make me think it was $6,000. My recollection, as far as I had any, was $3,000.

Q. You signed the certificate of stock, did you?

A. As president of the company?

Q. Yes.

A. I don't remember; I presume so. It was issued while I was president.

Q. Did he pay anything for the stock?

A. He did.

Q. What?

A. It was in these notes of Parmeter's.

Q. These notes referred to?

A. Yes, sir.

Q. What did he do with the notes then; did he deliver them to you?

A. I could not tell you; they came into my possession some way.

Q. They came into your possession about what time?

A. I should say in the winter of 1872 or 1873.

489 Q. Did Watkins have any of this stock?
A. He did.
Q. How much?
A. The same Foster had.
Q. How much did he pay for it?
A. The same way; they were together.
Q. Paid for it in these notes?
A. In these notes; yes, sir.
Q. At what rate was the stock issued on the dollar?
A. At 50 cents on the dollar.
Q. Did either of them pay anything for their stock except in these Montreal notes, as they were called?
A. They did not.
Q. Had you not previously to the time of taking these notes seen them in Foster's hands?
A. I don't remember that I did; I have no recollection of it.
Q. When was the matter of taking notes for the stock issued to them first mentioned between you and Watkins?
A. I could not tell you; I think at the time they consented to take the stock, but what time that was I could not tell more definitely than I have. I should think in the latter part of 1872 or the fore part of 1873.
Q. When did you purchase Parmeter's quarry from him—make the bargain?
A. I think that was about January, 1872, if I recollect right.
490 Q. Was part of the purchase price to be paid him in these notes?
A. I had intended it myself; but I suppose you refer in your question as to whether I had such an agreement with him?
Q. Yes.
A. I have no recollection of having any agreement with Parmeter about it; I don't know but I did.
Q. You then intended to pay in part in those notes, did you?
A. I did.
Q. Then you knew of their existence, did you not?
A. I did; when I had such intention I did of course.
Q. Foster held them at that time, did he not?
A. I think he did; you mean in his physical possession?
Q. Yes.
A. I think so.
Q. You had previously talked with him about applying these notes toward the payment of the purchase from Parmeter, had you not?
A. With whom?
Q. Foster.
A. I don't remember about that; I have no recollection about it.
Q. How could you have intended to apply them?
A. I take it, if I owned the notes, I could do as I liked with them.
Q. Did you own them?
A. To the extent of my interest, I suppose.
491 Q. When did you become the owner of them?
A. Whenever I gave the stock to them.
Q. Where are the notes now?
A. I don't know.
Q. Where were they when you last saw them?
A. I think that I gave them back for some purpose, either to Foster

or Watkins, or somebody that represented them, or claimed to represent them.

Q. When?

A. I have no distinct recollection.

Q. About when?

A. *About when?*

A. I could not state.

Q. What year?

A. It must have been in 1873.

Q. Who did you deliver them to?

A. I have no recollection.

Q. Was it Henry P. Foster?

A. I couldn't say in regard to that.

Q. Some one for Foster and Watkins?

A. I think so; that would be my best recollection.

Q. Have you ever seen them since?

A. I have no recollection about it.

Q. Did you not tell De Marquis Parmeter, in the fall of 1874, that you then had the notes in your possession?

A. I have no recollection of it.

Q. Will you say you did not so tell him?

A. I will not, for I don't know.

Q. You knew of the time of the sale of the property mort-
492 gaged to plaintiff for the $10,000 in controversey, when it was sold at auction, in the foreclosure of the mortgage?

A. I did.

Q. You were at Potsdam at the time?

A. I was.

Q. At your office on that day?

A. I don't remember about that; I knew about the time of the sale.

Q. Do you remember that Mr. Foster, the defendant, was in your office at the time of the sale?

A. I don't remember of it.

Q. How much did the Montreal notes amount to, principal and interest, when you took them?

A. I think in the neighborhood of $15,000, interest and all.

Q. They were made nearly six years ago this time?

A. I should say somewhere in that neighborhood.

Q. Did you not tell De Marquis Parmeter, on or about September 7th, 1874, at Potsdam, that you then held the Montreal notes; that they were delivered to you by Foster and Watkins for their stock in the Potsdam Sandstone Company, and were all that they were paid or were to pay for their stock—that in substance?

A. I say yes to all of it with the exception of that which im-
493 plies physical possession of them. I don't think I told him that, because I don't think I had it.

Q. Did you not tell one G. S. Smith, of Rome, between October 15th and November 9th, 1872, at Potsdam, in talking in relation to the quarry business, that you intended to get the plaintiff Butler into it?

A. I don't know any such man that I know of; at least I have no recollection of such a man.

Q. Did you know a man sent to Potsdam from Rome to get stone to Rome as fast as possible upon a contract Parmeter had there?

A. For a church there?

Q. Yes.

A. Yes, sir.

Q. Did you not tell this man as above stated?
A. I have no recollection about it.
Q. Can you say you didn't?
A. No.
Q. You don't remember about it?
A. I do not.
Q. Did you not, in the fall or summer of 1872, ask Trueman Jones to take some stock in the proposed company, in your office?
A. I have not the slightest recollection of it.
Q. Can you say whether you did or not?
A. I can't; I haven't the slightest recollection of it.
Q. Can't you say you didn't?
A. No.

494 Q. Did you not, in the summer of 1872, in you' office in Potsdam village, say to the defendant Watkins in substance that if he would take an interest in the stone business he would make money out of it?
A. I have no recollection about it at all.
Q. You can't say whether you did or not?
A. I have no recollection about it at all.
Q. You can't say whether you did or not?
A. I have no recollection about it at all.
Q. Did you not, in the summer or fall of 1872, ask the defendant Watkins to try and get William A. Sandford interested in the sandstone project?
A. I have no recollection about it; it seems to me, now you mention it, I have some indistinct recollection of some such thing.
Mr. RUSSELL. Q. Did you do so?
A. I don't remember.
Mr. PARKER. Q. Can you recollect now the time that the price Hunt was to be paid per day was finally agreed upon?
A. I don't remember anything about it.
Q. Was not Hunt, when he was settled with, paid back to Jan'y 14th, 1873?

495 A. I don't remember. I could not tell without looking at the books.
Q. Do you remember that he was paid for the time he was there in January?
A. I do; at least the first time he was there, if it was in January; I think it was.
Q. Do you remember having an interview with the plaintiff at the American Hotel about March, 1874?
A. I have no recollection of it.
Q. Did you not call on him at the hotel March, 1874, in the spring?
A. Very likely I saw him in the spring; whether it was March I could not say.
Q. In the spring of 1874, at the American House?
A. Yes, sir.
Q. And had some talk with him about your business?
A. I had.
Q. Did you then and there tell him that the certificate of appraisal was got up to raise money on?
A. I don't remember it was spoken of at all.
Q. Did you tell him that?
A. I don't remember that I did or did not. I have no recollection that the certificate was spoken of.

Q. You recollect the conversation?
A. I remember of an interview with him.
Q. Lasting how long?
A. Perhaps an hour or fifteen minutes.
496 Q. Don't you now recall you said that to him?
A. I do not.
Q. In applying to plaintiff for money for the defendants Watkins and Foster, in August, 1873, did you not do it at their request?
A. I did.
Q. Were you examined under oath or proceedings supplemental to execution before Theodore H. Swift, in Potsdam, in July, 1874?
A. I think I was about that time.
Q. In what way was the $10,000 in question borrowed of plaintiff paid to you?
A. I think a check on the National Bank of the Republic at New York.
Q. Plaintiff's check?
A. Yes, sir.
Q. Where did you place it?
A. I think I placed it in my account in the St. Nicholas National Bank in New York, where I kept an account.
Q. What date?
A. I don't remember.
Q. Immediately after receiving it?
A. Yes, or soon after.
Q. Did you soon after lend or pay over any money to Foster and Watkins?
A. I did.
Q. On what day?
A. I could not tell you; it was within a few weeks afterwards.
Q. Was it not on the 8th of February?
497 A. I could not say. I have no means here of fixing the date.
Q. Could you tell by looking at Mr. Swift's minutes?
A. No; all that I could tell would be what he has taken down. I have no recollection of it. I should say within six weeks of the time I received it. I should say within six weeks of the time I received it. I should say within four weeks, but within six at the outside.
Q. Was it not as early as the 8th of February?
A. It might have been; I could not say.
Q. What amount?
A. I loaned them first $2,500.
Q. How much did you loan them the next time?
A. $1,500.
Q. Were both transactions on the same day?
A. They were.
Q. How did you pay it to them—in what way, cash or check?
A. I think I gave them a check on the St. Nicholas National Bank, if I recollect right.
Q. For the whole $4,000?
A. I think two checks, one for $2,500 and the other for $1,500.
Q. Was it loaned to the the company or to the individuals?
A. I think the loans were made to the individuals, Foster and Watkins; that is my recollection about it.
Q. What was the firm a name of the firm they were doing
498 business together in?
A. I don't remember.

Q. Was it Watkins and Foster?

A. Very likely it was. It seem to me it was. I don't remember precisely. I am inclined to think it was Watkins and Foster.

Q. You think the loan was to them individually and not to them a' copartners?

A. I think so.

Q. At the time you received this money from Mr. Butler how much money had you in bank?

A. I could not tell you.

Q. Less than a hundred dollars?

A. I could not say. I have no recollection about it one way or the other, except, I think, I hadn't much money, because I think I was pressing to get money.

Q. And that you hadn't much on hand?

A. Yes, sir; that general fact I don't remember.

Q. Did you not state in the examination mentioned that this $4,000 came out of the $10,000 borrowed from the plaintiff?

A. I don't remember anything that I stated.

Q. Was that the fact?

A. I think it was.

Q. That it came out of that $10,000?

A. Yes, sir.

Q. Did you examine your cash-book with reference to this
499 $4,000?

A. When do you mean?

Q. At the time of this examination before Mr. Swift.

A. I don't remember. I think I did; but I don't remember about it.

Q. Did not your cash-book show the payment of the four thousand dollars mentioned, but failed to show the repayment of more than $1,300 of it?

A. I think not.

Q. What can you say as to that?

A. I think not. I have no recollection of any*thing* such thing.

Q. Did you not state upon that examination that the "$4,000 paid me by Foster and Watkins $1,300 is all that is on my cash-book"?

A. I have no recollection of any such thing.

Q. Can you state you did not?

A. I cannot.

Q. Do you remember that was the fact or not?

A. I do not.

Q. This sandstone company issued what is called a scrip?

A. It did.

Q. About when?

A. I think principally the whole of 1873, used in paying the men.

Q. Were Foster and Watkins consulted about its being used before it was issued?

A. I don't remember.

Q. Was it issued without their being consulted?

500 A. I have no distinct recollection of consulting them about it.

Q. Did you say it was done without their knowledge?

A. I could not say in regard to that. I have no distinct recollection of consulting them about it *distinct recollection of consulting them about it.*

Q. Who was the scrip signed by?

A. I think it was signed by myself, as president of the company, and Henry Foster, as secretary of it.

Q. For what purpose was it used?

A. It was used in paying the men.
Q. How much of it was issued?
A. I don't remember.
Q. About how many thousands?
A. I don't know. It seems to me $2,000 or $3,000 of it; possibly more, possibly less. I should be more inclined to think more than less.
Q. Was it not a great deal more?
A. I don't remember anything more than I have stated.
Q. Did you, on the 5th of September, pay Watkins and Foster a note of $339, given for sandstone scrip taken by them at the store?
A. You mean 1873, I suppose?
Q. Yes.
A. I don't know; I have no recollection of it. I paid them notes; I don't remember that note.
501 Q. You paid them notes given by you or the company to you as partners for this scrip?
A. Yes, sir.
Q. Don't you remember this note of $330 or $340?
A. I think I remember a note somewhere in that neighborhood; about that amount; there were several notes paid.
Q. Several notes of that character paid?
A. Yes, sir.
Q. They took scrip at their place of business for their goods?
A. They did.
Q. And received the note of the company for them?
A. They did.
Q. For the scrip; and the company paid them notes afterward?
A. Yes, sir.
Q. The company issuing the scrip to the men?
A. Yes, sir.
Q. Was not H. P. Foster visiting your daughter as a suitor at the time the certificate of appraisal was signed?
A. I think he was.
Q. What amount was expended in the quarries in 1873?
A. I hardly know how to answer that. What do you refer to?
Q. What was paid in work upon the quarries? Do you distinguish between what was done in getting out stone and what was done in cutting the stone after they were got out; do you include both—including both?
A. I should say from $4,000 to $6,000.
502 Q. What proportion of that was paid by the proceeds of the stone?
A. I could not tell you without reference to the books.
Q. Who furnished this money used?
A. I did; the most of it.
Q. How much of it did you furnish?
A. I could not tell without looking at the books.
Q. As nearly as you can get at it?
A. I could not tell you without reference to the books.
Q. About how much was it?
A. I furnished in one sense all of it; all that was expended; I had the entire charge of it.
Q. How much did you furnish outside of what was received from the stone and paid into the concern?

A. I could not tell you without an examination of the books. It has gone completely out of my mind.

Q. Did you not pay out any money furnished by you in the sandstone company's business—from $20,000 to $30,000?

A. As a rough estimate, I should say I did. I don't know but more.

Q. What was the agreement between yourself and Mr. Foster, Watkins, and others as to your being repaid this money?

503 A. I don't know that there was any agreement at all, unless you point your question to something more definite. I don't catch what you are at.

Q. By your agreement with the defendants Foster and Watkins were you to furnish all the money for carrying on the sandstone business?

A. I was.

Q. And under that agreement how much did you furnish?

A. I could not say any more definitely than I did a few moments ago. I furnished all there was furnished.

Q. Was it less than $20,000?

A. No; I should think it was more.

Q. By that agreement were you to be repaid out of the receipts of the business?

A. Well, I hardly know what you mean by agreement. If you mean talking over and settling that *that* it should be so and so, that is one thing, but if you mean that I went on managing the business with an expectation of my own in regard to it, that is another thing. I will give you what you call for.

Q. I want your understanding between you and them.

504 A. I have not slightest recollection of having talked it over with them at all.

Q. Was it not the agreement between you and them that you was to have no claim for the money advanced, but that the receipts in the stone business were to be divided among the stockholders without deducting anything for these advances?

A. I think not. I have no recollection of any such agreement.

Q. Did you not swear, upon the examination before Mr. Swift, these words: "I own most of the stock. The money put in was to carry on the business. I was to have no claim for money back. I was to put in some $25,000 or $30,000, and to take nothing back. The profits were to be divided according to the stock"?

A. I could not say whether I used that language or not.

Q. Did you say that in substance?

A. I am inclined to think I did.

Q. Were you, by your agreement with Foster and Watkins, to furnish all the funds and take the risks of the business, they to incur risk, but to share in the receipts of the business, without deducting

505 anything for your expenditures?

A. No.

Q. Was the money you put in to be used in carrying on the business?

A. I am unable to answer your question, because I don't know what you refer to.

Q. You mentioned $25,000 or $30,000. I ask if it was used to carry on the business?

A. It was.

Q. Were you to have no claim for that money back?

A. I don't understand the question, whether you refer to some affirmative agreement or an agreement that would be implied in law.

Q. I am not asking for the law, but the facts. Can you answer the question?

A. I cannot in its present form, because I don't understand whether you refer to any fact as a positive agreement, or a question of law as to what would be implied if I advanced money to the company. If you will point out which you want, I will give you a definite answer.

Q. Was it understood between yourself, Watkins, and Foster that you were to have no claim for that money back, and that the receipts of the business were to be divided among the stockholders, upon the stock?

506 A. I think they and I understood the law to be that that would be the situation and obligation of the parties. I think I have heard them say so.

Q. Was there any understanding of fact between you and them to that effect?

A. I think they understood that as a fact; that the law was so.

Q. Was it the agreement between you and them that this should be so?

A. I could not answer that other than I have heard them say that they could not put any money into the business, or incur any liability in regard to it.

Q. Was it understood between you and them, in your negotiation in forming this company, that they should put no money into the business and take no risk?

A. It was, except so far as the purchase and holding of the stock carried the necessity of putting something in, and a certain contingent liability.

Q. Was it understood between you and them that there should be no deduction or repayment to you of the money you put into the business before the receipts were divided among the stockholders?

507 A. I don't think there was any understanding about it any more than each one might have had some understanding of their own. I had my own understanding in regard to it, of course.

Q. Did you understand that you were to have your expenditures in the business returned to you out of the business in any other way than as a dividend on the stock?

A. I don't know I had any definite understanding about it.

Q. When Foster and Watkins stated to you that they would not take any risk or loss, did you make any objection to it?

A. I don't think that they stated it quite in that shape.

Q. How did they state it?

A. That they had no money to put in it, and could not get mixed up with its liabilities; that I must take the burden of it on my own hand. I told them I understood all that. If they took stock, that limited their connection with it except as trustees or directors.

Q. What was the loss in the attempted development of the Ben Cox quarry that year?

A. That depends upon circumstances. If you abandon it, all of it was a dead loss except the stone you got out sold.

508 If it is carried on as a quarry, then all of these excavations become important and useful things, and worth just what they cost, if the——

Q. If the quarry is good for anything?

A. Yes, sir.

Q. Which you didn't find to be the fact, I take it?
A. O, yes, we did.
Q. What amount did you expend in developing that quarry?
A. I think fro*m* $1,500 to $2,000, as I stated.
Q. Who furnished that money?
A. I did.
Q. Were Foster and Watkins to repay any portion of it?
A. I don't think there was ever a word said about it. I never heard them say a word about it. I don't think they knew much about it.
Q. You bore that loss entirely yourself?
A. I did not.
Q. Who did?
A. I could not tell you. I put the money into the business, and that as a part of it. In one sense you may say I bore the loss, for I owned almost the entire company, and when I went out of course I lost my interest.
Q. Did you not, in fact, bear the loss?
A. I don't know what you mean by the question.
509 Q. Did you not furnish the money that was lost, and not get it back again?
A. I furnished all the money used in the quarry.
Q. Did you furnish that money and fail to get it back again?
A. Yes, sir; I furnished that money and have not got it back. And so with all the other money I put in.
Q. Have you any claim upon Foster and Watkins for any portion of that money?
A. That is a legal question.
Q. By your agreement with them?
A. I had no agreement with them about it.
Q. Does the language, "I owned most of the stock. The money I put in was to carry on the business. I was to have no claim for money back. I was to put in some $25,000 or 30,000, and to have nothing back. The profits were to be divided according to the stock," which you say you are inclined to think you used in the examination before Mr. Swift, state the facts, as they exist?
A. I think it does not.
Q. Wherein does it not?
A. In saying I was to have nothing back, there was no agreement in regard to it at all that I am aware of. I had my understanding of course as to what my legal relations with the company would be
510 from putting in this money; I think that expresses it just as it is.
Q. And the statement you made before Mr. Swift was not correct?
A. I think it does not express it fully, does not express my meaning fully.
Q. Were 200 shares of the stock transferred to Watkins, Foster, and Cox at any time?
A. They were.
Q. What time?
A. In the fore part of January, 1874.
Q. For what purpose?
A. My best recollection is that there were 200 shares transferred to Cox, Watkins, and Foster for the benefit of the company itself; that is, to hold as a reserve capital.
Q. Was it not understood when the company was organized that

Foster and Watkins were to have the right to take more stock, if they wished, at any time, at 50 cents on the dollar?

A. I think there was some talk of that kind. I could not swear positively there was such talk; I have a faint impression there was some talk about that; that they were to have any amount they wanted at 50 cents on the dollar; I could not say positively.

Q. Was not the amount they were to have a right to take included in those 200 shares?

A. No.

511 Q. Who signed the $5,000 note of December, 1873, to the plaintiff?

A. Cox and Watkins and Foster and myself. I don't know but that it was signed in behalf of the sandstone company—no, I think not; I think we four individuals signed it.

Q. Was the money used in the sandstone business?

A. It was.

Q. Was not substantially all the money obtained from plaintiff, amounting to $20,000, used in the sandstone business?

A. I could not say what proportion.

Q. Wasn't all of it, substantially?

A. I should say not all; I think a large portion of it, more than one-half. I should say perhaps more than three-quarters.

Q. Was not more than nine-tenths of it?

A. Possibly; no, I think not.

Q. Can you say that more than $16,000 went into the sandstone business?

A. I should think more did.

Q. How much more?

A. I could not say any more definitely than that.

Q. More than $17,000?

A. I could not say.

Q. You can't state any more definitely?

A. No.

Q. Can you specify any other notes that were used in the sandstone business except those that came from Mr. Butler?

512 A. My own which I put in, and what funds I could raise I did.

Q. What amounts were they?

A. I could not tell you.

Q. Can you specify them?

A. I could not; I never kept any distinction in my funds.

Q. You can't specify any notes or items used in the business except money that came from Mr. Butler?

A. I could not; that was got specially for that purpose.

Q. When you received the money from Mr. Butler you had $20,000 or $30,000 of notes just falling due?

A. I don't remember about that; which money?

Q. The $10,000.

A. I don't know; I presume likely.

Q. Do you remember any notes falling due just at that time?

A. I do not.

Q. Was Deacon Milton Brown a clerk of yours?

A. He was.

Q. During what period?

A. For about 14 years ending December, 1871 or 1872; I should say about that time.

Q. When did he die?
A. At that time.
Q. He remained your clerk till his death?
A. Yes, sir.
Q. And was your general assistant in your office?
A. He was.
Q. Your right-hand man?
513 A. He was as I have stated, assistant in the office and confidential clerk.
Q. That was the fact, was it? I thought he was your general and confidential assistant.
A. Yes, sir.
Q. Was process in this action served upon you while you were a resident of New York?
A. It was.
Q. When did you leave New York State?
A. On the 21st of October, 1875.
Q. Did you state to Foster, Watkins, or either of them, before leaving, that you intended to return in a few weeks?
A. I couldn't say I told them so.
Q. You don't remember that you didn't?
A. I could say I told them so.
Q. You don't remember that you didn't?
A. No; I don't remember that I didn't.
Q. You haven't returned there since?
A. I have not.
Q. Your family came on without your going back after them?
A. Yes, sir.
Q. Where were your checks, check-books, bank-books, and cash account-books running up to 1874—from 1870 to 1874—when you last saw them?
A. I don't remember whether they were in my office or whether you took them or your partner.
Q. Were they not left in my possession?
514 A. I am inclined to think they were. I don't remember exactly about that; they had been in your possession.
Q. Were they not left at Parker & McIntyre's office, at Potsdam?
A. I don't remember. I am inclined to think they were. I can't say, because they had been back and forth from your office to mine a number of times.
Q. Your best recollection is they were left at Parker & McIntyre's office?
A. I could not say that, because I don't remember. My impression was the other way. You may be right about it.
Q. Where are the letters that were written by the plaintiff to you from January, 1870, to January, 1874?
A. I don't know where they are.
Q. Have you any of them in your possession?
A. Not that I know of.
Q. Don't you know whether you have or not?
A. I don't know. I made search for them last night, but could not find them.
Q. What did you do with them?
A. They were all done up in packages and labelled as to date—all were filed—their dates and persons from whom received; done up in

packages and put away in a chest of drawers in my barn at Potsdam.

Q. When was that?

515 A. That was before I came away. I had always kept them there. I had done a long time—old letters.

Q. Have you seen them since, the letters of the plaintiff to you?

A. I have not; they were mixed up with other letters.

Q. Have you seen them or any of them since?

A. I have seen none except those that were exhibited to me yesterday.

Q. Were they among those left in your barn at Potsdam?

A. Which?

Q. Those that you saw exhibited yesterday.

A. No; I think not. I had given those to Mr. Russell before I came away.

Q. Then you gave a portion of them to Mr. Russell before you left St. Lawrence County?

A. I did.

Q. What portion?

A. I have no recollection. I gave him a few letters; eight or ten, I should think.

Q. Where are the letters written by the plaintiff to you, to the best of your knowledge?

A. I have no knowledge of them since I left them in a chest of drawers, done up in respective packages, with others.

Q. You left them in a chest of drawers in your barn at Potsdam?

A. I did.

Q. And you have no knowledge of them since?

516 A. I have not. I think some were in my office, the more recent letters.

Q. Have you given authority to either of the defendants or their counsel to examine and take away any of them?

A. Never that I recollect.

Q. So far as you have any knowledge, all the letters are there, are they?

A. I don't know of their being removed. I don't know anything about that. I gave no authority for their removal, except I directed all my papers to be sent to me.

Q. Including these papers?

A. I didn't specify in particular. I said send all my papers.

Q. How long ago was that?

A. I think in November last, when my family came.

Q. You have not received those letters?

I have not found them. I made search for them last evening, opened some boxes I hadn't opened before, and I didn't find them.

Redirect examination:

Q. I will *Q. I will* ask you a question as to yo'r arrest on the 29th of December, 1873; it was then, was it not?

A. It was.

Q. Your arrest was upon civil process, also upon a warrant from the magistrate, upon which you were afterwards indicted?

517 A. Yes, sir; however, those arrests were discharged.

A. They were.

Q. No trial ever had upon the indictment?

A. None.

Q. And no suit upon the civil process?
A. None on the process; I think it was prosecuted to judgment.
Q. You were released from arrest by the creditors?
A. Yes, sir.
Q. You and the plaintiff in a case you were indicted upon are on perfectly friendly terms?
A. We are, very.
Q. State what effect that arrest had upon your business at that peculiar time.
A. It utterly mixed it.
Q. What proceedings did it cause to be instituted against you in the matter of suits?
A. I think there were about thirteen mortgages foreclosed against my property, all of them nearly in the hands of parties who just wanted their interest for twenty years; that is all, as far as I know; willing to let the loans stand as long as I chose to pay interest.
Q. They became alarmed at your arrest?
A. Yes, sir.
Q. Take four of the farms you have jotted down on this paper and say how much you lost on four of these farms by foreclosure sales.
518 A. I lost upon four of them an aggregate of actual loss of money about $16,000, if I recollect right.
Q. $16,876?
A. 16,876 on four mortgages. In addition to that I lost, by increasing my indebtedness what claims of parties whose interests were all sacrificed, whatever the sum first figured there; the first I gave you is accurate.
Q. $5,600?
A. 5,600.
Q. In addition to that by increasing claims against you?
A. Making about $22,000 in the aggregate.
Q. Upon sales you had made of the farms?
A. Yes, sir.
Q. At the time you left New York and came here you intended to go back, did you not?
A. I did.
Q. You found a permanent connection after you got here?
A. I did.
Q. Is that the reason you didn't go back?
A. That was one reason; another was I found it was difficult to raise money, and my brother failed to get me passes; he expected to get me passes.
Q. Were you anything more than an occasional advisor of Foster and Watkins?
A. Except in the Hitchings and Brown matter.
Q. Who did the legal business for Mr. Foster generally?
A. I think Judge Knowles more than any other one.
519 Q. Who for Mr. Watkins?
A. I think he went to Judge Knowles more or less.
Q. Also to Hon. A. X. Parker?
A. Mr. Parker did some of it.
Q. And to Judge Tappan?
A. Yes, sir.
Q. What was the reason you seemed to appear as agent for the parties desiring loans instead of agent for Mr. Butler in making the loans?

A. The principal reason was to avoid the effect of the usury law upon loans.

Q. Whose interest did you especially look after in making the loans?

A. Mr. Butler's; still it was distinctly understood I was not his agent.

Q. In making the loans?

A. Yes, sir.

Q. To whose order was Mr. Butler's check made payable generally on those loans you procured; what was the custom in that respect between you?

A. Usually, I think, the check was made to the order of the borrowerer.

Q. In any instance made to your order?

A. I think it was in some cases.

Q. When you received mortgages for foreclosure were you authorized to receive payment without commencing suit if the parties chose to pay?

A. I was.

520 Q. When you state you cannot specify the particular conversation had with Mr. Butler in regard to various matters you have negotiated with him, what do you mean when you state you cannot specify the particular conversation?

A. I can't single out the particular conversation—give the time, place, and particular words, but only the general tenor.

Q. Have you a c[illegible]recollection of the general tenor of your conversation upon that subject?

A. Entirely, sir.

Q. At the time Mr. Watkins was in New York was he there for any business whatever for you and Mr. Butler?

A. None whatever; not that I know of; no, sir, none with me.

Q. At the time you obtained the certificate from Foster and Watkins did you get two duplicates certificates of appraisal?

A. I did.

Q. Did you say anything to them at that time about Mr. Butler?

A. I did not.

Q. Did you say anything to them at that time about getting a loan of money?

A. I did not.

Q. Or at any time prior to that?

A. I didn't that I know of; I have no recollection, at least.

Q. You stated that on the 31st day of December, 1873, you then were insolvent, and on the 1st day of December, 1873, you were solvent; state what caused the sudden change in your prospects.

521 A. It was the proceedings that were had that we have spoken of, my arrest. I was already embarrassed seriously. I had ample property to meet it all.

Q. Most all the farms you had owned you had sold and were under contract?

A. They were.

Q. For very much larger sums than the encumbrances upon them?

A. Some not very much; some very much larger.

Q. What effect did the foreclosure have?

A. Wiped out all my agreements with the persons I sold to, and made me liable to them for damages; wiped out their indebtedness to me as well as made me liable to them over and above that.

Q. At the time that you obtained the certificate was it your intention

to raise money at that time by means of a stock company as preferable to a loan, and to try that first?

A. It was.

Q. Did you do so?

A. I did; you speak of certificate, not certificates.

Q. So far as the investigation you made of the different quarries named in the certificate of appraisal, did they exhibit the same general character and features as that which distinguished the Potsdam
522 sandstone?

A. They did.

Q. And which had been sold under that designation for many years?

A. Yes, sir; one of the quarries was more valuable than the Parmeter quarry; reckoned far better than that. I had them appraised before I bought them.

Q. Prior to buying them you had skilled persons examine and acquaint you as to whether they were good quarries or not?

A. I did.

Q. And in your judgment, at the time of the certificate of appraisal, were these quarries worth less or more than the sums named in the certificates of appraisal?

A. Much more.

Q. Apart from the purchase price of different lots, and apart also from the money you had expended in developing them and the time you expended, did you also expend money in keeping up the reputation of the stone and in making sales?

A. I did.

Q. All that you considered in the value of the property itself?

A. Yes, sir.

Q. Was that the means you took to develop the value?

A. Yes, sir; I did it from time to time.

Q. To a large amount of money?

523 A. Quite a large amount. I visited Montreal, New York, Albany, and visited them repeatedly.

Q. State the cause of your selling your law library at the price you stated.

A. I had to sell it or lose it.

Q. Did you try to buy it back?

A. I did.

Q. How much did you offer?

A. I didn't offer anything. I found I could not buy it except at a very large advance.

Q. How much?

A. I think $1,000. I wouldn't say it was $1,000. It was quite an advance, and I wouldn't pay it.

Q. Was there any written agreement of any kind, to your recollection, between you and any members of the Potsdam Sandstone Company in regard to the formation of a company, except the certificate which was signed by you?

A. I have no recollection of any.

Q. You stated to Mr. Parker, as to others, but it was not taken down, that you not only had talked with Foster, Watkins, and Cox about it taking an interest in these quarries, but also with others. State, generally, what others there in Potsdam.

524 A. I think that Judge Tappan, Judge Knowles, E. D. Brooks, Luke Usher, and others outside of Potsdam.

Q. Was there any agreement made between you and Mr. Forster and

Mr. Watkins as to how much or how little you were to be repaid for your advances to the company?

A. No; nothing whatever that I recollect of.

Q. Was the interest in the Parmeter note—called by Mr. Parker the Montreal notes—of par value to you?

A. It was just the same as so much money, to be applied on the payment of the quarry I bought of Parmeter.

Q. What monies, generally speaking, did you put into the sandstone business after the 1st of January, 1873?

A. All that I could raise from all sources except what I used for other purposes.

Q. Now as to the money derived from your law business over and above the amounts needed for your family expenses?

A. They were put into the stone business. I might have had other calls upon me besides family expenses.

Q. And other necessary calls?

525 A. And other necessary calls.

Q. How as to the monies derived from the sale of the stone?

A. The same.

Q. How as to the sums paid to you, or obligations owing to you? (Dep. 48.)

A. The same thing. I also borrowed some money from other parties, and borrowed some from the bank.

Q. How much did you borrow from the bank?

A. I think, perhaps, from $4,000 to $6,000.

Q. How much from other parties?

A. A few $100 perhaps; that would be my best recollection.

Q. That leads me to this question: Was the $4,000 borrowed of you by Mr. Foster and Mr. Watkins repaid?

A. It was.

Q. Within what time after it was borrowed?

A. It was paid in small payments. I got the whole of it, I should say, by June—the first of June.

Q. At the time it was obtained was it understood to be a loan?

A. It was.

Q. And every dollar of it was repaid?

A. It was, I suppose.

Q. Counsel spoke of cash-book. Was that cash-book kept for daily entries of sums received and deposited?

526 A. I kept such a cash-book, but it was very imperfectly kept. I was more particular with entries I paid out than what I received. Entries of what I paid out were pretty carefully made, but monies *but monies* were received were not; and the cash-book he refers to is one that was made up a long time afterward, from what sources I could get at.

Q. What did Watkins and Foster *reply* for first to you at the time of the $4,000 loan?

A. For legal advice *Q.* As a result of the legal advice they applied to me to endorse a note.

Q. What did they apply for? They applied to you to endorse a note for how much?

A. I don't think the sum was definitely agreed to. They had got to raise $2,000 or $3,000.

Q. What further did you say?

A. I declined.

Q. What did you say?

A. I said I was just going into this business. I told them I could not endorse that note.

Q. For what reason?

527 A. Because I was just going into the stone business, and I didn't want to complicate myself with them or anybody. I had enough load myself without endorsing large notes.

Q. What did you say you would do?

A. I told them I had some money; I could loan them a little money—money I had got for the sandstone business; they could have it if they wanted to use it

Q. Did you tell them where that money came from?

A. No.

Q. Did they know?

A. No.

Q. You let them have how much?

A. $2,500.

Q. Then afterward, same day?

A. That was in the afternoon. I had a little doubt the propriety of loaning so much, and in the afternoon, after reflection upon the matter, I told them I could spare them $1,500 more, making $4,000.

Q. Were the persons from whom you purchased these different quarry lots those who, prior to your purchase of them, had been in possession of the lots as owners?

A. I think so.

Q. In each case?

A. I think so. In the case of the Hicks lot the quarry was owned by Palmer E. Havens. That was not in his actual possesion. Aside
528 from that I think they were all actually possessed by the owners.

Recross-examination:

Q. The matter upon which you were indicted was the charge of false pretences for obtaining the sum of $5,000 from John Scullin?

A. $8,000, the purchase price of the farms he purchased of another man.

Q. And the indictment was nolle pross'd only on your making restitution?

A. On my settling the debt with him.

Q. You settled the debt by making restitution?

A. I settled the debt.

Q. Was it not by making restitution?

A. Call it whatever you choose. There was no restitution about it. I owed him the debt and paid it.

Q. Was it not on your making restitution?

A. I think not. I don't call it restitution. I simply paid my debt.

Q. You paid the debt?

A. I did.

Q. You were charged with having obtained the amount under false pretenses?

A. Yes, sir.

Q. Did you pay it out of your own property?

A. I did not.

Q. Out of whose?

A. My wife's.

Q. What four farms were they that you lost sixteen thousand
529 dollars upon?

A. One was called the Arram lot, the other was called the

Cory farm, the other the Ben Cox farm, and the other the Judd farm.

Q. And these losses arose only from the fact that the land, in being sold at auction, failed to bring as much as you expected to otherwise get out of it; was not that the fact?

A. No; what I expected was not to get out of the land, but to get out of the contracts on which I had sold the land to the purchasers. I had parted with the ownership of the land mostly.

Q. Was one of the parties to whom that land was contracted one Judd?

A. No; two Judds.

Q. And the loss in that case was how much?

A. About four thousand eight hundred and seventy-one dollars (4,871).

Q. The Judds were insolvent, were they not?

A. They were not; they were perfectly solvent.

Q. Did they not become insolvent?

A. They did not to my knowledge. I never heard it. I never heard it at any time.

Q. They are men of very small means and without any ability to pay such a sum as the amount of the loss?

530 A. No, sir; I don't think that is true. They are men of small means, but not without ability to pay.

Q. Only a thousand dollars or so, are they?

A. I don't know; they owned a small farm adjoining this farm.

Q. Their own success in being able to pay you depended upon their ability to make it out of the land, did it not?

A. No; out of that and out of their own farm. They owned a farm beside.

Q. Subject to a large mortgage, was it not?

A. Which?

Q. The farm they owned.

A. No. I don't know; I think not. Still I cannot speak positively about that.

Q. Was this land sold upon very long time?

A. It was.

Q. What length of time?

A. I don't remember. It was a long time—a great number of years.

Q. Were not the losses occasioned by the difference between the price for which you had sold the land and the price for which the land sold when sold under the mortgage foreclosure?

A. Yes, sir; I think they were, if I get hold of the meaning of your question.

Q. Have you not been attorney for Mr. Watkins for several

531 years, and considerably?

A. Not very much. The Hitchings and Brown matter was the most important matter I had for him.

Q. You had been attorney for the old firm of Watkins & Leete for many years?

No; they usually went to Knowles. Occasionally I did some business for them.

Q. You did amount of collections for them?

A. Not of late years. They were only small.

Q. A great number of years?

A. They were a great many years ago, when I first began practice.

Q. Did you travel through the central part of the State with Watkins in trying to adjust Hitchings and Brown matters?

A. I went to Syracuse with him and to Utica.
Q. Did you on that trip go to New York?
A. I did.
Q. Did he?
A. I think he did, on the same business.
Q. When was that?
A. I think that was in February, 1873.
Q. Why did you get duplicate certificates of the appraisal?
A. Because I was applying to several different parties to induce them to take interest in the sandstone business. I got those cer-
532 tificates to be used in that way, so that I could use two at a time.
Q. Did you request them to sign them?
A. I did.
Q. Did they sign them without making any inquiry of you?
A. You mean as to what?
Q. Anything. Did they sign them without making inquiry of you?
A. I don't remember about the signature, whether it was done in my presence or not. The substance of it was arranged before.
Q. Between whom?
A. Between us.
Q. Between who?
A. Watkins, Foster, and myself.
Q. How long before the signatures were made?
A. I could not tell you.
Q. Same day or the day before?
A. I could not tell you.
Q. What is your best recollection as to the time?
A. I have no recollection of it whatever.
Q. Was it a week, or a month, or a day?
A. I could not tell you.
Q. Was it less than a month?
A. It would be more a matter of reasoning than recollection.
Q. Have you no recollection upon the subject?
A. I have not. Reasoning, I should say it was within a short time before.
533 Q. Were they when you had this interview with them, previous to the signing of it?
A. I have no recollection.
Q. Can you swear you had any?
A. Any what?
Q. Any interview with them about signing the certificates of appraisal before they signed them?
A. I think I did. I think I remember that general fact.
Q. Where was it?
A. I could not tell you.
Q. How long before they were signed?
A. I could not tell you.
Q. Who was present?
A. I could not tell you.
Q. What was said?
A. I don't remember, except we went into a general talk of the value of the property, and I explained to them my views in regard to the value, and they made inquiries as to the value of the different quarries; that is all I can tell you in regard to it.
Q. Did you answer them?

A. I did.

Q. Was anything said as to what you intended to do with the certificates?

A. Yes, there was.

Q. Anything said about using them for the purpose of selling stock?

A. I could not say that it was brought down to the point of selling stock.

534 Q. Did you obtain the signatures in pursuance of your letter to Mr. Butler of December 12th, 1872?

A. I could not tell you. I don't remember about that.

Q. Did you intend to use either of the papers in obtaining money from Mr. Butler?

A. I did.

Q. When you had them signed?

A. I did.

Q. And you so used it?

A. I did. Your question was general in getting money from Mr. Butler?

Q. Yes; did you intend to use it in procuring the loan of $10,000 from Butler?

A. I could not say as to that.

Q. You mean you don't remember?

A. I could not tell without looking more particularly at the papers. I don't recall the several dates; the particular connection of the two I don't recall.

Q. You understand, from you correspondence with Mr. Butler, that he required an appraisal of this property before loaning the money on it, didn't you?

A. I did.

Q. Did you obtain the appraisal to comply with that requirement?

A. I think I did.

Q. Can you say whether you did positively?

535 A. That would be my best recollection about it, especially as I have looked at the copies of the letters since, and have seen the date of the appraisals themselves.

Q. Did you obtain the signatures to the appraisal from Foster and Watkins without telling them what you intended to do with it?

A. Except as I have already stated, I did.

Q. Did you obtain the certificate of appraisal sent to Mr. Butler with the bond and mortgage from Foster and Watkins without informing them what you intended to do with them?

A. I did, except, as I have already stated, the general purport of it; they knew I informed them of it.

Q. Did you obtain the signatures of Watkins and Foster, or either of them, to the certificate of appraisal sent to Mr. Butler, the plaintiff, upon any pretense or representation of using it for any purpose except that for which it was finally used?

A. I didn't obtain it from them on any pretense whatever.

(Question repeated.)

A. The answer is repeated.

Q. Will you answer the question as it is put?

A. I shall answer if the commissioner directs.

536 Q. Did you obtain the signatures of Watkins and Foster, or either of them, to the certificate of appraisal sent to Mr. Butler, the plaintiff, upon any representation of using it for any purpose except that for which it was finally used?

A. I don't know how to answer that question. I am free to say I hardly know whether to say yes or no to it. I have fully stated what I represented to them. I used it in accordance with that general purpose. The purpose for which it was used is embraced in the general representation that I made to them in obtaining their signature to it.

Q. I ask for a direct answer to the question, and repeat the question.

A. I could not give any other answer than that which I have already given.

Q. Will you answer yes or no to it?

A. I could not.

Q. Will you answer it according to the fact?

A. The answer would be the same as before. The principle purpose for which one was used was embraced in the general purpose I announced to them in getting the two certificates.

537 Q. (By the COMMISSIONER.) Did you intend to use them for any other purpose than getting up a sandstone company?

A. O, yes.

(Plaintiff repeats the question and asks for a direct answer. Previous question read.)

Q. Did you or did you not?

A. The purpose for which the one I sent to Mr. Butler was used was embraced in the general purpose announced to them when I got both of them. I was to use it for getting up a sandstone company and getting people into it.

Q. And getting money to carry it on?

A. Yes, sir.

Q. Did you obtain the signature of Watkins and Foster, or either of them, to the certificate of appraisal sent to Mr. Butler, the plaintiff, upon any representation of using it for any other purpose except that for which it was finally used? I call for a direct answer.

A. I think I shall have to answer I didn't.

Q. That is the fact, is it?

A. That is the fact as I understood the question, to call for whether I made any representation to those gentlemen that those certificates were to be used for anything other than the raising of money for

538 the sandstone company. (Dep. 51.) And I say I didn't make any representation to them other than this.

Q. Do you mean that you communicated to them that you intended to use those certificates to raise money for the use of the sandstone company?

A. I do.

Q. Do you swear to that positively?

A. I do.

Q. Do you say that you stated to them that you intended to use those certificates to raise money to be used in the sandstone company?

A. For getting parties interested in the sandstone company, which would result in getting money afterwards.

Q. You got them for the purpose of getting money for the sandstone company, did you?

A. I did, in that way.

Q. You told them what you wanted them for?

A. To that extent, yes, sir.

Q. Did you tell them what you wanted them for?

A. I did.

Q. And what you wanted to use them for?

A. I did; to get up the sandstone company.

Q. Can you now specify the time or amount of any repayment of the $4,000 received by Foster and Watkins any more definitely than you did on your examination before Mr. Swift?

A. I can't.

539 The above deposition was duly signed by the witness and certified by the commission.

SAMUEL B. GORDON.

The foregoing testimony and deposition was fully read over to Samuel B. Gordon, said witness, after he had testified thereto; and after he had been first duly sworn, and after all corrections therein made by him, which were made by consent of counsel of both parties, he did depose and swear that said deposition and testimony were true, before me, this 26th day of February, A. D. 1877, at the city of St. Louis, in the county of St. Louis and State of Missouri; and he did at the same time subscribe the same, and I retained the said evidence and annexed it to the notice, and to the stipulation of counsel for the taking said deposition by a stenographer, and I sealed the said deposition in an envelope directed to the clerk of the court named in this notice. The reason for taking the deposition is because the witness resides more than one hundred miles from the place where the cause of action is to be tried.

In witness whereof I have hereunto set my hand and affixed
540 my notarial seal, at office, in the city of St. Louis, county of St. Louis, and State of Missouri, on this the 26th day of February, 1877.

[L. S.] SAM'L N. HOLLIDAY,
Notary Public, St. Louis, Mis., & Officer taking said Deposition.

[By the clerk, by stipulation & order.]

STATE OF MISSOURI,
County of St. Louis, ss:

I, Ferdinand L. Garesche, clerk of the county court of St. Louis County, the same being a court of record, certify that Sam'l N. Holiday, whose name is subscribed to the certificates of proofs of acknowledgement of the annexed instrument dated February 20 & 26, 1877, was, on and between said dates, an acting notary public in and for said county, duly commissioned and qualified, and authorized to take the same; that I am acquainted with his handwriting and verily believe that the signatures thereto are genuine, and that to all such his official acts full faith and credit are and ought to be given. I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of St. Louis, this 27 day of February, eighteen hundred and seventy-seven.

F. L. GARESCLE, *Clerk.*

The following letters were identified, offered by defendants, and received in evidence, to wit:

POTSDAM, *June* 16, 1870.

JOHN G. BUTLER, Esq.:

DEAR SIR: Since you were here I have been looking over the prospects of money *money* lending here. Our village has a population of

about 4,000, is a town of about 8,000, & is the business centre of about 40,000 people in this and some 15 surrounding towns. The lumber, sandstone, and agricultural business that centres here is important, &
in the hands of the most prudent and wealthiest men in this
541 county. There is only one national bank in the county & that is here; all the other bankers in the county prefer'ed private banks—the Judsons at Ogdensburg, Avenhills & Chapman at Ogdensburg, Avenhills & Anthony at Gouverneur, and some one else at Canton. There is great call for another bank here, & I have been often urged to start one. It is my opinion the best location in the county. I had much rather have a second bank here than the only one at Canton. Usher's bank has a capital of $162,000. Its usual deposits are about $160,000 There could be readily used here $200,000 additional banking capital. If I had $100,000 I think I could use it to advantage, & could safely count on getting an average of $50,000 of these deposits. If I had this amount ($100,000), I would make the management of it my business. If you were to furnish me a much smaller sum I would do the best I could with it, but would still keep up my legal business. I find on examination that the moneys placed in my hands by Mr. Frederick Fletcher, & of which I spoke to you, were only $3,000 at first, Feb'y 2, 1859, were increased a little afterwards, & finally divided January 25th, 1863, shortly before I closed business here to go to
542 N. Y., & yielded a little over 22 per cent. semi-annual interest, i. e. 11 per cent. every 6 mos. But this was a small sum, & is, of course, no criterion by which to judge of any other investments. This did not include any of the moneys I loaned for him on bond and mortgage. But he never lost a dollar of either fund or of their increase. I could safely promise you or you and Mr. Dunckle seven per cent. semi-annual interest on any large or small sum you may intrust to my management, and a probability of more. In regard to buying out Butler & Dunckle's business, after buying it out I could not conduct it successfully without some counsel and assistance from yourself or Mr. Dunckle. All of your time and labor I will ask if you will retain an interest; is just enough to enable me to conduct the business properly. I do not ask you to do any of the business, but simply to see that I do it and do it right. But I want one or both of you to retain an interest for one year, even if only an eighth, because, first, it will give me confi-
543 dence in myself; 2d, it will retain the present credit of the concern; 3d, it will secure money to do business with; and, 4th, it will be a guaranty of success. If I buy more than a half interest I do not want to give security outside of the property I buy for over $10,000. I do not say that I will not, but simply that if that amount will suffice I prefer it.

I appreciate and am obliged to you for your kindness in these and other matters, and I desire for reasons stated to you to avail myself of it. But under no circumstances to your disadvantage. If you shall aid me to a position where I can recover my losses, I will gladly accept it, provided I can see a certainty that you will loose nothing by it and a probability that it will be to your advantage.

Yours very truly,

S. B. GORDON."

19 BEAVER ST., N. Y., *June 18th*, 1870.

S. B. GORDON, Esq.:

DEAR SIR: When our Mr. Butler was at your place you and he had some conversation, he tells us, in regard to your buying out our

544 business, and he told you finally that if you bought us out and Mr. Duncklee was willing to retain an interest here he would retain as much as Mr. Duncklee would. Now, Mr. Duncklee has made up his mind to sell out and will not consent to retain an interest, as he has made other arrangements. Still we advise you to buy out this concern if you want to go into business, for you can make a fortune in it in ten years time. We know you can, and the advice is conscientiously given. It is a good chance.

Yours, truly,

BUTLER & DUNCKLEE.

19 BEAVER ST., N. Y., *June* 30, '70.

S. B. GORDON, Esq.:

DEAR SIR: Yours of June 16th is just rec'd. In reply, I will say that the banking idea looks favorable, and I think well of it. If you can get up a bank in Potsdam of $100,000 capital, Mr. Duncklee & myself will take stock in it, provided one of us is made a director.

545 We don't think anything of less capital would be large enough to make it an object. We wrote you a day or two since in regard to the selling out of our business here. As to the idea of a bank, would it not be best, and will you not feel around among the monied men in your vicinity and see if the necessary amount cannot be raised to start an institution that will pay largely. The idea that Mr. Duncklee and I have is that it is best to start in on $100,000. My money comes to me in installments, and I have some by me now, but $100,000 is enough to start on, and then we can increase it to $200,000 if we find it pays. If we do get up such an institution, it must be on the basis that no director or stockholder can have any loan from the bank unless he puts up collaterals, and such collaterals as are security beyond question. If anything is done, it should be done now, and I want to hear from you by return mail on this subject. If we go into this thing, it must be on the understanding that each of us shall not be liable for anything to

546 any amount beyond what each of us individually subscribes; and Mr. Duncklee must have the right to the first subscription, that is, we must have the right to put in as much of the $100,000 capital as we please. Perhaps you will think best that both of us should be directors, Mr. Duncklee & myself.

Yours, truly,

JOHN G. BUTLER.
Per D.

POTSDAM, *June* 19, 1870.

J. G. BUTLER, Esq.:

DEAR SIR: I want to buy out Butler & Duncklee's business, provided I can, 1st, satisfy myself that I can conduct it successfully; and, 2d, can command the necessary means. As for the first point, I would go to New York and look into it as well as I could if you thought best; & the second point could be arranged, for I can give you $10,000 perfectly good security. But, as you tell me, $35,000 would be necessary to get stock and carry on the business, I would be "nowhere" unless you, or you and Mr. D., would aid me. I have, of course,

547 no claims upon either of you to assist me, but if you, or you and he, see fit to help me into your business, you shall not suffer from any lack of effort or from any intentional fault of mine. May I trouble you to write me what arrangement, if any, I could make for the residue

of the necessary means. I have no doubt that a pretty good banking business could be done here by a firm composed entirely of Democrats, but not such an one as I would like to have you and Mr. Duncklee identified with on my advice. Mr. Cox is the wealthiest business man here, and one of the best men in every respect, but concerted efforts have been repeatedly made to choke off his business, but without success, for he always keeps a Republican partner, has such ample means, and is withal so good a man that they can't do it. The same thing is true of myself, so far as the efforts to insure my business and lessen my influence are concerned. The somewhat public nature of my business probably makes a little more obnoxious to these efforts. A bank is a public institution in one sense, appealing to the public for its
548 patronage. I think I can make one successful even with none but Democrats, but it would be like my business, an up-hill matter. To be just right, we should have two or three of the best and most competent Republicans with us to take the curse off. If I had time given me to arrange it, and knew that I could depend on from you, I think it could be placed on the right basis, but not on the spur of the moment. So far as I am concerned, however, I will do either, but prefer to go to New York into your business.

Yours, very truly,

S. B. GORDON.

19 BEAVER ST., N. Y., *Aug.* 10, 1870.

S. B. GORDON, Esq.,
Potsdam, N. Y.:

DEAR SIR: Yours of the 4th is received. I have considered the matter you therein refer to of starting a bank at Potsdam, and have concluded we must give up the idea of taking part in such an enterprise at present for the following reasons: 1st, the war in Europe
549 has created an active demand for capital, and monied men here feel safer to keep their means in hand, not knowing what emergency may arise; 2d, we are ourselves subject to demands that we must meet, and cannot spare our money for other purposes; 3d, the decease of Mr. Duncklee's father has mad' a change in his plans; 4th, we are in doubt as to the advisability of putting a new bank forward at present, and we believe and advise you that you can and will make more money yourself by operating as you did recently in the case of the $1,500 note than you possibly could do as an officer of such a bank. The reason we have first given you, viz, the war in Europe & its probable effect, is our principle reason for our coming to the above conclusion, though the other reasons adduced have had weight with us in making up our minds. You have no idea what an effect the war is having on the minds of the people here, business men. There may be times when you have opportunities to make loans that one of us can furnish
550 the funds, and in such cases we shall be pleased to do so if in our power.

Respectfully, yours,

BUTLER & DUNCKLEE.

POTSDAM, *Aug.* 15*th*, 1870.

Messrs. BUTLER & DUNCKLEE:

DEAR SIRS: Your favor of the 10th inst., is received and sets me back a little, for I had considered the bank a pretty sure thing, provided the people here would encourage it, and I so represented it. Your de-

cision is all right of course, and I do not write complainingly, but permit me to take enough of your time to explain the situation and to make a proposition. All talk about the new bank has been strictly confidential, so as not to let the old bank know anything of it, but talking it even in this limited way I find a very strong feeling in favor of the movement, much greater than I had any idea existed. The following persons would take stock and be directors: 1, Henry Watkins;
551 2, Charles Cox; 3, S. B. Gordon; 4, Aaron T. Hopkins, Democrat, a prominent tried business man of wealth and influence; 5, Albert Town, Republican, ditto, formerly lived in Pierpont and also in Colton, neighboring towns, and has more influence financially with the people there than any other man; 6, Hon. Geo. Richards, Republican, a prominent lumberman of means, formerly N. Y. State senator; Gen. E. A. Merritt, Republican, late naval officer in New York City, who lives here, will, I think, also take stock and be a director; Hon. E. D. Borooks, Republican, U. S. collector for this district, and will give the bank his influence, and will take stock in the name of his son, who is to be teller. He himself is Usher's most intimate friend, and Usher was influential in getting him his office and *his* on his official bond, and for these reasons he thinks best not to take stock in his own name or be a director. He is rich and the most influential man in this part of the country. H. N. Redway, Republican, county treasurer, and an influential man here, will take stock. Hitchings and Brown, Republi-
552 cans, will take stock. Brown is endorser on the Duffy note. 7 parties at North Potsdam, 7 at Colton, and 3 at Hopkington will take stock, and one at each place will be director, if desired. We have selected some others for directors, if we want them, but have not yet spoken to them, but we have no doubt of their acceptance if asked, and we think we can get more of the stock taken here, and some prefer that, but I have insisted on having the bulk of the stock taken by you, so that you and I, with other Democrats, might control it, for although the list of directors agreed on is largely Republican and local here, it is so mainly to remove all political hostility, which is the only thing I fear. This board will do this, and will also give us great strength with the community, for all (save myself) are leading and representative citizens; but the leading control of the bank would be with you and through you with me, and this was distinctly agreed on. If through you and our Democratic friends here we can control a majority of the stock
553 I still want to go into it, but not otherwise. An old friend of mine, who has been most of his life a president or managing director of a bank, and a man of large wealth, would come here with his wife and stop with me, and set us agoing and give us such assistance from time to time as we might need. I would not like to ask him to take stock in it very largely at his time of life. W. H. Taylor, formerly bookkeeper in Usher's bank, and who left to go into business, is now out of business, and would be our bookkeeper. I wish you would lend me what money you can conveniently spare between now and say the 1st of January, with which I will take stock in the bank, in my own name, and assign it to you, as collateral security for the payment of my note which I will give to you for the money, at 7 per cent. interest per annum, payable semi-an'nually. With it and other stock in friendly hands I shall endeavor to control the organization and management, & I can, besides paying you 7 per cent., make 7 per cent. more for my-
554 self. I will organize the bank with a provision, as the law allows, for increasing the capital, and when it shall be thought best to increase the capital you shall have the first chance, if I can control it,

to take so much of the interest as you choose or more. Do not be angry with me for making such a proposition, but if you think it not advisable or convenient to do anything, so advise me, and I will let the matter drop, and keep on sueing people; but if you think best to do anything, let me know about the probable amount.

Yours, very truly,

S. B. GORDON.

19 BEAVER ST., NEW YORK, *August* 24, '70.

S. B. GORDON, Esq., *Potsdam, N. Y.:*

DEAR SIR: Yours of the 15th inst. has been received. You say ours of the 10th sets you back a little. We are sorry to hear you say that, but we must still decline taking any part in that enterprise of which you have been talking. We explained ourselves as fully as we
555 could in ours of the 10th inst. We think with the influence you have in that section, and with the influence and assistance of the prominent men whose names you mention in your letter, you will undoubtedly be able to start such an institution as you wish on a sound footing. We cannot promise you any assistance.

Yours, truly,

BUTLER & DUNCKLEE,
G. R.

It was here stipulated and agreed that Milton Brown, known as Deacon Brown in the testimony, in whose handwriting the certificates were shown to have been, died January 2nd, 1873.

The defendants here rested their case.

JOHN G. BUTLER was here recalled as a witness on his own behalf, and testified as follows:

I remember having a conversation with the witness Hunt, going to the quarries in company with Bingham and Cooke, in 1874. I said to Hunt, "Suppose I offered you these lots or $1,000, which would you take." He said he would take the $1,000. I had another conver-
556 sation with Hunt that fall at his house.

The witness being cross-examined testified as follows:

I made a memorandum of the conversation at his house. I have not testified what that conversation was. I did not make any memorandum of the conversation which I have testified to.

The plaintiff then offered in evidence, in connection with interrogatory 64 of *of* Gordon's desposition, letter August 10th, 1873, from Gordon to Butler, and the answer thereto, which is one of those hereafter named, and letters of August 23d, 1873, Gordon to Butler; August 27th, 1873, Butler to Gordon; August 25th, 1873, Gordon to Butler; Butler to Gordon, Sept. 2, 1873; September 4th, 1873, Gordon to Butler; September 5th, 1873, Butler to Gordon; September 5th, 1873, Gordon to Butler, September 8th, 1873, Butler to Gordon; September 9th, 1873, Gordon to Butler; September 6th, 1873, Gordon to Butler; September 12th, 1873, Gordon to Butler; September 13, 1873, Butler to Gordon. The said
557 defendants severally objected to letter of August 19th, 1873, and the answer thereto as offered, as incompetent, immaterial, and irrelevant; the objections were severally overruled, to each of which rulings the said defendants severally duly excepted.

Said letters were then read in evidence, and are as follows:

"POTSDAM, *Aug't* 19, 1873.

JOHN G. BUTLER, Esq.:

MY DEAR SIR: I went to Saratoga to get money of you as a business matter, giving what I regarded as ample security; i. e., the names of Mr. Watkins & Mr. Foster, a mortgage of my quarries or stock of the sandstone co, as collateral to my notes, each of three kinds of security, being what in the country here is considered good and sufficient, but not in the city. I now write to ask what I never asked of any other person, that is to make a business transaction, not on business principles, but a personal favor to me. I want an immediate loan of $5,000 on my note and a pledge of 4 times that amo'nt of P. Sandstone Co. stock, say on 6 mo's time, but to run, on payment of the interest
558 semi-annually, until I can establish my stone business. I also want the $5,000 for which you have my note to stand the same time on similar terms. I did not intend to sell much of my sandstone co. stock; but as soon as I can give it a good repute and value, by say another year's successful business, I will sell enough to pay you and let me out. I do not believe you will lose a dollar, if you do me this great favor. If you not, I believe my loss, by stopping the business and impairing my credit, will be more than $20,000, besides the mortification to my family and myself. No person knows the situation but you, not even my wife, nor Mr. Foster nor Mr. Watkins. I hope you may decide to take whatever risk there may be in granting this request for my sake & that of my family, whom I will when the danger is passed, advise of our obligations to you. I alone am to blame in this matter, for I knew I would want this $10,000, & I ought to have secured it before I struck a blow in the quarry.

Yours, very truly,

S. B. GORDON.

559 Mr. Foster has just been in. If you will buy a note or mortgage against him & Mr. Watkins for $10,000, $20,000, or $30,000 at one year, I will discount it so as to make it 13 per cent. & it will be perfectly legal. I am not mistaken about that. The mortgage property is worth about $45,000, including a farm of 155.29 acres in this town, worth about $6,000."

POTSDAM, *Aug.* 23, 1873.

JOHN G. BUTLER, Esq.:

MY DEAR SIR: Your favor of the 13th inst. was rec'd, but having already written you at Catskill on the 19th, I have waited a little for a reply to that. In answer to yours I hardly know what security to offer you besides the quarries or the stock or both, as I have got my means so largely into that property. I might, I suppose, get Mr. Foster and Mr. Watkins to sign a note with me for the $5,000, but I dislike to do that; but will, if you say so, & will be satisfied with that; it seems a pity for an undertaking so promising as this stone business is to large success merely from want of capital to carry it forward a little further. It is like a store to rent and not quite completed. Please let me
560 hear from you at your earliest convenience.

Yours very truly,

S. B. GORDON.

POTSDAM, *Aug't* 23, 1873.

JOHN G. BUTLER, Esq.:

MY DEAR SIR: Your favor of the 21st inst. is rec'd. I wrote you hastily this morning and said about all I can say. Your offer is not only a kind

one, but is a sacrifice on your part, even with the best security on my part. I do not wish you to incur a particle of risk that I can prevent & I wish I were not in a situation that drives me most unwillingly to ask a personal favor of you. Nothing but absolute necessity would induce me to do it. But my own folly and short-sightedness I am in this stone business without sufficient capital to carry it on. To stop is ruin, almost or quite. To ask for aid from any one here is idle for they have no more money to spare than I have & usually not so much, besides it would insure my credit here, where & when it is vital that it be kept and where it now is and ever has been—my quarries on the west side of the river.

561 The lots talked of to you cost me, all told, about $140,000
All of which is paid except 17,000

133,000
I have put into the business ab't 15,000

Making a total of 148,000

All of this I want to pledge to you for the return of your money & interest, by a mortgage of the real estate and the stone and everything else in the business, including contracts, &c., by a pledge of my stock. My other real estate is not in a situation to afford you satisfactory security, as I usually buy farms, &c., that are encumbered, and sell subject to the encumbrances, giving long time, and myself take care of the encumbrances, if need be. Still, anything I have I will gladly place between you and my possible loss. I have some money in the bank, but it is growing less daily. Payment for stone of course cannot be hurried unduly without injuring the business. It is the desire to prevent any shock to my credit that made me write you that I wanted an immediate loan of $5,000.

Yours truly,

S. B. GORDON.

LAKE GEORGE, N. Y., *Aug.* 27, '78.

S. B. GORDON, Esq.:

562 DEAR S'R: I can make you time loans, with such security as I have named in letters, but on no other security. If you write me you better direct to N. Y. I think I will remain here till first of next week. I shall be in N. Y. by Wednesday of next week.

Yours,

J. G. BUTLER.

You sue Benton on receipt. Write me in your next if you have.

J. G. B.

POTSDAM, *Aug't* 25, 1873.

JOHN G. BUTLER, Esq.:

MY DEAR SIR: Everything connected with our stone business corroborates our views of it before we began; that is, that if conducted properly for two years the profits will then be several hundred dollars per day during the working season, making an'nal dividends of nearer 30 per cent. than 15. Mr. Hunt has just returned from Boston, and we are promised immediately another large order of more than $15,000, and for next season all we can do. If the above view is correct, the quarries are and will continue to be valuable, and, if valuable for working, are worth something as security. I suggest that in case you let

me have $5,000 more, that I give you a mortgage of them for that
563 & the note of $5,000, making $10,000, and that I also give you, as collateral, P. Sandstone Co. stock to amount of $210,000. While this security would not be what you would wish, will you not take the risk of parting with the money on my bond with that security? This is all the risk I intended when I spoke of risk before. I do not think there is any risk, but you do. But I cannot bear abandoning this business when so near success. If, on receipt of this, you will send me the $5,000, I will, on its receipt, send you my bond for $10,000 and the mortgage and stock as soon as possible.

Yours, very truly,

S. B. GORDON.

N. Y., *Sep.* 2, '78.

S. B. GORDON:

DEAR SIR: Yours of Sept. 1, '73, rec'd. The P. S. Co. I would not take at any price. Why should you offer me such for money? Your opinion was, when I was in Potsdam, that Watkins and Foster paper wa' A No. 1, but since I left your place I have doubts about the cr. of W. & F., of course all on information (this conflicts with your opinion), and I am justified in not parting with my money if any doubts
564 come up. What is the reason you do not give me R. E. security? You own a house and farms. Mr. Gordon, I do not wish to part with my money when I have any doubts. I hope now you will obtain this money from some other source. You say certain men are good. What if others say otherwise? A nice position to put one in. I have the money, and you can have it, only I must have security, and I hope you will give such security as I desire, or get your money from some other source. I rec'd from Levi H. Brown, July 17, '73, $2,518. Are you ready to collect this B. & M.? If you will, collect at once. Have you sued Butler & Benton? Write on receipt.

Yours,

J. G. BUTLER.

If you cannot attend to collecting B. & M. of Brown & Vickery, say so, and I will send to Cook.

POTSDAM, *Sept.* 4, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of the 2' inst. is received. I never heard the credit of Watkins and Foster doubted before. I know that Watkins is good for over $100,000. Foster claims (and I believe
565 truly) that he is worth $75,000. There is no doubt whatever about the above statements nor about their soundness financially. I wanted the $5,000 for 4 mo's, either on their note and mine, or my own note with the Sandstone Co. stock as collateral. But as you do not want the stock collateral I will give you my own note and Watkins and Foster as endorsers, and would not ask for the money if I thouht there was any doubt about its safety. When I found, a few weeks ago, that I was to be disappointed in getting this $10,000 from Paddock of Watertown, it almost threw me off my feet, and I went to you for relief, which you gave me to the extent of $5,000, and now I want this other $5,000 on my note with Watkins & Foster as endorsers, for 4 mo's only, during wh'ch time I have a clear and distinct plan in view by which I shall straighten the matter out. Every day shows me clearer that my original views of the sandstone business are to be realized.

My business is all that I can reasonably ask. I want this money and at once, and I really hope you will advise me to send on the note and get it for I have relied on it to meet maturing obligations, mostly to my men. Do not get frightened and think everybody is
566 going to fail, for it is not so. One objection to getting very rich is that it makes a man lose confidence. Don't fall into that bad way; but, to talk seriously, do not disappoint me in this loan on my note and Watkins & Foster as endorsers. I have sued J. H. Butler. I shall foreclose as fast as the laws will allow. Send on bond and mortgage against Vickery & Brown & any others & I will put them through in the same way.

Yours in haste,

S. B. GORDON.

I did not foreclose the Benton mortg. because they paid the back int. which sent you at Catskill.

N. Y., *Sept.* 5, '73.

S. B. GORDON:

DEAR SIR: Yours of the 4th rec'd. I have not rec'd Benton int. I cannot send the money. Look to my last letter; that is all-sufficient. You do not comply with my request. You have no right to press me for loans. Every loan made has been made out of friendship.
567 Now, when you cease to press me, perhaps if you should come here on receipt of this I could name one man in your town, or one in Canton, with W. & F., that would bring the money. You must comply with my wishes or not have the money. If you do not come here on receipt on your business I will send S. and M. by mail.

Yours truly,

J. G. BUTLER.
21 *Beaver St.*

You will make up your mind soon, I hope. I have firmness.

J. G. B.

POTSDAM, *Sept.* 5, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: I wrote you hastily yesterday about the $5,000 loan for 4 mo's on a note made by me, Henry Watkins and Edward W. Foster. I need the money and at once, as I have made full reliance on using it at this time, but you of course do not want to part with your money in doubtful security. If there is any one here whose guarantee of the note will make it good, or two or three such men, I will get them, one or more, to guaranty its payment if you will name the men. I
568 make this suggestion because I do not know how on such short notice *know how* to get along without the money.

Yours truly, in haste,

S. B. GORDON.

Whenever I had wanted money from the bank here, my own note, with the endorsement of any one man I choose, brings it when they can spare it.

N. Y., *Sept.* 8, '78.

S. B. GORDON, Esq.:

DEAR SIR: Yours of 6th rec'd. Benton interest not received by me up to this date. Find Brown & Vickery B. & M. inclosed for $5,000,

rec'd. interest, $175.00. In L. H. Brown letter of June 7, '73, July 17, '73, rec'd in L. H. Brown letter draft for $2.518.00, balance of B. & B. Balance of S. & M. with interest is due. You sue this at once. If your business is such that you cannot look after it, send to Cook and order him to sue and collect. If you send me Watkins, Foster, Cox and W. C. Cook, of Canton, with your own name on a note payable to National Bank of Republic, N. Y. City, with int. on 4 mo's (note must
569 read we jointly and severally promise to pay) this will bring the $5,000. I have sent to the postmaster at Catskill and Lake George for your letter with Benton interest. The other B. & M. I will send you on Tuesday.

Yours,

J. G. BUTLER,
21 *Beaver St.*

" POTSDAM, *Sept.* 8, 1878.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of yesterday is rec'd, & the Vickery & Brown bond & mortgage therein enclosed, which I at once set to foreclosing. In the J. B. Butler case the papers have been served, and but few days more before the time to answer expires. I will have the Vickery & Brown foreclosure out of the way by the time the other comes, which you say you will send next Tuesday. I am obliged for the offer of $5,000 on note of Cox, Foster, Watkins and Cooke, but I fear I could not get them. Cooke never signs notes for any one under any circumstances, & Cox very rarely.

Yours truly, and in haste,

S. B. GORDON.

570 POTSDAM, *Sept.* 6, 1878.

JOHN G. BUTLER, Esq.:

DEAR SIR: Your favor of yesterday is received, and I hardly know what reply to make. The indelicacy of pressing you for loans is, I think, as painfully apparent to me as it can be to any one, but by Mr. Paddock's disappointing me on promised assistance, by joining us in the stone business, I was unexpectedly put in a position where I must beg for temporary help until I could make other arrangements. Those arrangements I have now made, and shall have them carried into effect before the middle of November, unless I am broken down by continual disappointments in every direction. I beg you will not understand this remark as reflecting in the least on you. For, although I relied on getting this money ($5,000) on 4 mos. on my note with Foster & Watkins, still it is not only your privilege but your duty to yourself to refuse the loan if further information satisfied you that the security would not be good, or was even doubtful. It was to accom'odate the se-
571 curity to this new situation that I suggested that if you would name some of our wealthy citizens, one of whom would by his guaranty of the note make it good in your estimation, I would get him on the note. Still, I said this without consulting any of them. The richest man in this town, without exception, is Charles Cox, worth over $200,000. The next is Bloom Usher, worth $. The next is Henry Watkins, over $100,000. There are very few more here worth than Edward M. Foster. This in the estimation, I mean, of people about here. My lawsuit comes on to trial on the 15th inst., & I need every day until then in prudent and careful preparation for it, & ought

not to leave home to go to New York even on this pressing business. But what shall I do? My men are unpaid. For my business to come to a stand-still at this critical moment is a great pity. My credit once gone, or even much impaired, can be restored only after years of effort, even if at all. We have $5,000 due us, but that does not pay men. I do not know what to do.

Yours, very truly,

S. B. GORDON.

I sent you the Benton back interest at Catskill, Aug. 28, and you have probably received before this.

572 POTSDAM, *Sept.* 12, 1873.

JOHN G. BUTLER, Esq.:

DEAR SIR: I know Cook would not sign a note with me or any one; I did not believe Cox would, but he has; and enclosed in the note I also enclose Luke Usher's certificate as cashier, that our names are good for $40,000 at the bank here. If you can let me have the money, & feel perfectly safe beyond any possible contingency, I would be glad to have you do so.

Yours, very truly,

S. B. GORDON.

THE NATIONAL BANK OF POTSDAM,
Potsdam, N. Y., Sept. 11, 1873.

To whom it may concern:

The joint names of Charles Cox, Henry Watkins, Edward W. Foster, and Samuel B. Gordon, are considered ample security for the sum of $40,000 (forty thousand dollars) by this bank.

LUKE USHER, *Cashier.*

N. Y., *Sep.* 13, '73.

S. B. GORDON, Esq.:

573 "DEAR SIR: Yours of the 12th rec'd; find inclosed check for $5,000. I hope *I hope* this will be all of the money you will be obliged to borrow.

Yours truly,

J. G. BUTLER,
21 *Beaver st.*

I shall want all of my money when due.

J. G. B.

The Leonard chattel mortgage must be renewed, as it runs out on 15th Oct., 1873. Let me hear from you in relation to it.

J. G. B.

GEORGE PARKER was then recalled as a witness for the plaintiff, and testified as follows:

I have examined the map made by Mr. Hunt and compared it with my figures. The croppings out of the stone show comparatively larger in proportion to the size of the lots on the map than the reality is.

The witness on being cross-examined testified as follows:

do not mean to testify that the size of a single one of the croppings out is relatively wrong. I do not mean to say that the size, as marked in figures and feet, of any of the lines is wrong. I do not sup-

574 pose that the map was got up for the purpose of showing the whole area of the lots. The size of the croppin's out of the stone, as marked on the map, agrees with my general recollection of it.

ANDREW J. TRAIN was recalled as a witness for the plaintiff, and testified as follows:

I procured specimens before I came down here of the stone out of the Cox quarry. The sample procured by Hunt is not an average one.

Recross-examination:

Question. Is this specimen produced by witness as fair a specimen of the B. Cox quarry as another specimen, being a specimen shown of the Parmeter quarry?

(The plaintiff objected to the question, the court sustained the objection, and defendants severally excepted.)

The witness further testified on cross-examination:

I did not dig to get my samples from the Cox quarry; I took those which had been exposed to the weather, snow, and ice.

RICHARD DOWNEY was recalled as a witness by the plaintiff, and testified as follows:

575 The stone produced by def't as coming from Cox quarry is not a fair sample of stone in Cox quarry.

Q. Did you have a conversation with the witness Smith at his house in regard to his being a witness?

Answer. I did.

Did he say he could be a good witness for Butler?

(The question was objected to severally by the defendants as incompetent and immaterial; the objection was overruled, to which ruling the said defendant' severally duly excepted.)

Answer. He said that he would be as good a witness for Butler as for the defendants.

PETER POST was recalled as a witness for the plaintiff, and testified as follows:

I think the specimen produced by Train is a fair specimen of the quarry as to color and durability.

On cross-examination the witness testified:

I have never seen any of the stone from the Cox quarry after they have been dressed.

The evidence was here closed, and the foregoing is all the tes-
576 timony given on said trial material for the motion for new trial or writ of error, as directed by court in settling case & exceptions.

The said defendants Foster and Watkins severally duly requested the court to charge as follows, to wit:

1st. To instruct the jury that the evidence in the case and all the inferences that can be properly drawn therefrom are not sufficient in law to prove the cause of action alleged in the declaration against the defendants Foster and Watkins, and the verdict of the jury should be in their favor.

2nd. To instruct the jury that the evidence in the case and all the inferences that can be properly drawn therefrom are not sufficient in law to prove any cause of action against the defendants Foster and

Watkins, and the verdict of the jury should be in their favor.

577 In case the above instructions are denied them, said defendants, and each of them, severally request the court to charge as follows:

3rd. That it is the duty of the jury to find that every act done by defendants Foster and Watkins was fairly and honestly done, when the evidence of such act naturally and reasonable justifies such construction.

4th. That the plaintiff cannot recover upon the finding of the jury that the defendants Foster and Watkins were mistaken in the value they gave to the lots, even though they find that they knew such value to be incorrectly stated.

5th. That the plaintiff cannot recover upon the findings of the jury that the defendants Foster and Watkins were mistaken in the value they gave to the lots, even though they had good reason to believe such value to be incorrectly stated.

6th. That in making the loan to Gordon it was the duty of plaintiff to consider all the information furnished him by Gordon stating that the stone had all been taken from one of the quarry lots.

578 7th. That in making the loan to Gordon it was the duty of the plaintiff to consider all the information furnished him by Gordon relative to the character of the property, as to whether it was in its nature speculative or stable in value.

8th. That in case the jury find that the plaintiff would have made the loan to Gordon without the certificate, plaintiff cannot recover.

9th. That in case the jury find that the certificate was made without intent on the part of the defendants Foster and Watkins that it should be used to obtain a loan of money, and without any knowledge, belief, or intent on their part that it was to be so used, and that Gordon did use it to obtain the loan of plaintiff without the knowledge or consent of either of the said defendants, then the plaintiff cannot recover of either of the said defendants Foster and Watkins.

10th. That in case the jury find that either of the defendants Foster and Watkins at the time the certificate was made delivered

579 the several quarries and quarry lots mentioned in the certificate were worth the several sums, or in excess of the several sums stated in said certificate, plaintiff cannot recover of such defendant, although the jury find that such quarries or quarry lots, or any of them, were actually worth less than the sum in such certificate stated.

95,

11th. That if the jury find that the plaintiff did not act with ordinary prudence in making the loan to Gordon, he cannot recover.

12th. In judging of the acts of the defendants Foster and Watkins, it is the duty of the jury to take into consideration whether Butler was informed before making loan of their proposed interest in the sandstone business.

13th. In judging as to the reliance that plaintiff put upon the certificate, it is the duty of the jury to take into consideration the statement of Butler, made after the loan, that he made such loan from friendship to Gordon.

14th. That unless the jury find from the evidence that all the

580 defendants agreed and conspired together to cheat and defraud the plaintiff by having the defendants Foster and Watkins make the certificate offered in evidence, and to therein represent the quarries

and quarry lots to be worth more than they really believed them to be worth, and that pursuant to such agreement, and with intent to cheat and defraud the plaintiff, the defendants Foster and Watkins did make such certificate, and did therein value said quarries and quarry lots, or some of them, at a sum greater than they believed them to be worth; and that the defendant Gordon used such certificate to obtain the loan of the plaintiff pursuant to such conspiracy and agreement; and such loan was made to said Gordon upon the strength of such certificate, the plaintiff cannot recover.

15th. If the conspiracy, substantially as set forth in the declaration, is not proven to the satisfaction of the jury, plaintiff cannot recover.

16th. To find that there was a conspiracy, the jury must be
581 satisfied from the evidence that all of the defendants corruptly and with intent to cheat and defraud the plaintiff agreed together to cheat and defraud the plaintiff by means of the certificate.

17th. That until independent proof is made establishing the conspiracy, the acts or declarations of Gordon are not evidence against the defendants Foster and Watkins, or either of them.

18th. That if the jury find that the defendants Foster and Watkins believed the statements contained in the certificate at the time they delivered the same to Gordon, the plaintiff cannot recover, even if such defendants, or either of them, did not examine the lots sufficiently.

19th. That in case the jury find that the lots mentioned in said certificate before the making of such certificate, at Potsdam, had usually been designated quarries and quarry lots to the knowledge of the defendants Foster and Watkins, the use of such designation in such certificate
582 to designate such quarries and quarry lots, or any of them, would not be evidence of fraud.

20th. That the jury are not bound by the amount realized for the property at the foreclosure sale, but may find from the evidence that the value of the security at that time was equal to or in excess of the amount due upon the mortgage and costs of foreclosure.

21st. That in case the jury find that the value of the security at the time of the foreclosure sale was equal to or in excess of the amount due upon the mortgage and the costs of foreclosure, then plaintiff cannot recover.

22d. That in case the jury find that the value of the security at the time the certificate was made was equal to or in excess of the amount of the mortgage and the costs of foreclosure, the plaintiff cannot recover.

The court refused to charge the jury according to either of the
583 requests to charge numbered 1st, 2nd, 4th, 5th, 14th, 15th, 16th, 20th, 21st & 22d, except as contained in the charge of the court which is below given, & to each of the refusals to charge seperately made, viz, to refusal to charge the 1st, 2nd, 4th, 5th, 14th, 15th, 16th, 20th, 21st, & 22 requests, the said defendants Foster and Watkins, by their counsel, severally duly excepted.

Which exceptions were taken to each refusal to each request.

The charge of the court to the jury was in substance as follows, viz:

There is no question but that defendants Foster and Watkins, each for himself, made the certificate as a representation of the value of the lots severally, nor, but that they delivered it to the defendant Gordon to be used by him as a representation of such value to whatever person he might show or deliver it to, nor, but Gordon delivered it as such

representation to the plaintiff; nor, but that plaintiff after receiving it advanced to Gordon $10,000 on mortgage of the Hicks, Cox, Falls, and Meacham lots; nor, but that he pursued mortgage to foreclosure and sale at $1,500, at cost of $542.08, leaving $957.92, July 18, 1874; nor, but that Gordon is insolvent. The certificate is important in this case only as to the four lots, Hicks, Cox, Falls, and Meacham. In
584 certificate, Hicks lot is put down at $5,000; Cox at $8,000; Falls at $8,000, & Meacham at $5,000. It is claimed by plaintiff that certificate was willfully false; that it was made by Foster and Watkins and used by Gordon to defraud him, and that they succeeded to the amount of that $10,000, less what he has received.

It is claimed by defendants that certificate is true, that it was honestly made to be used about organizing a company, and not for the purpose of raising money, and that it did not injure plaintiff.

Here lies the controversy. The certificate is a representation that Foster and Watkins had been acquainted with these lots twenty years, and that, in the best judgment of each, the Hicks lot was worth $5,000; Cox, $8,000; Falls, $8,000; & Meacham, $5,000. Dec. 12, 1872, they certify to that acquaintance and their own best judgment, and that only; what the quality of their judgment would be the plaintiff took the risk of, good or poor; if he got their best judgment, he got all he was en-
585 titled to, they only stated it was their best. If they were not acquainted sufficiently to fairly have an intelligent judgment according to their judgment, it was false in that respect.

If they were acquainted and they gave their best judgment, then it was true; and they are not liable. If these lots were not of the value they certified, and they knew it, then it would be false; and they would be liable. If they were not so acquainted as in their judgment to have a judgment, and assumed that they were, and gave as judgment what was false and what would not have been judgment if they had been acquainted with the lots, as they assumed they were, then it was wilfully false, although they might not have known it was not true.

That is, if they knew that the lots were not worth what they represented them to be worth it was wilfully false.

If they did not know they were not worth that, but knew they did not know enough about it to judge whether they were worth that or not, it was wilfully false.

If, in fact, false, still they only assumed to represent the value according to appraisal; and if, in fact, the four quarries or lots
586 mortgaged to plaintiff were actually worth twenty-six thousand dollars, then the representations were true in that respect, although they did not know or think it was, and they would not be liable. So, if the four lots were fairly worth the $26,000 appraised at, the verdict would be for the defendants. If the certificate is true, that is, not wilfully false, then the defendant is entitled to your verdict.

If the certificate was false, and wilfully so, the next question is whether it was so aimed by defendants that plaintiff has a right to complain if injured by it.

If wilfully false, and they made and delivered it to Gordon to be used by him as a representation of the value of each of the lots for the purpose of raising money on the faith of it from whomever he might present it to that might rely on the value of the property as security, it was a sufficient intent to injure plaintiff if Gordon presented it to him as such representation and by its falsity it did injure him.
587 If not delivered to be used as such representation of value to raise money on the faith of it, relying on the value of the prop-

erty as security, then there was no sufficient intent to injure plaintiff, and he cannot recover.

It is not necessary to find they intended to cheat the plaintiff, or any one, out of his money ultimately. If they intended to induce some one to advance money, relying on the property as security, it is sufficient, although they hoped and expected it would be paid if the security in fact failed, and the debt is not paid if the certificate was wilfully false and was made, delivered, and used with that intent. Still, plaintiff is not entitled to recover unless it injured him without his fault contributing to the injury. If he relied upon it as a representation of the value of the property and was, in the exercise of ordinary care and prudence, thereby induced to make the loan of $10,000 on that security, it did injure him. Still, if it was made for the purpose of getting up a stock company, and not to raise money, or to be used as an inducement to raise money, they are not liable.

So, if the plaintiff has made out—

588 1. That the certificate was wilfully false;

2. That it was made to be used to raise money with on faith of the value of the lots, as represented by it as security, of whomever it might be presented to;

3. That it was presented to plaintiff in pursuance of that design;

4. That he was induced by it to loan his money on faith of that security, in exercise of such common care and prudence about relying on certificate as would reasonably be expected;

5. That the security has failed to some extent.

You may then find for plaintiff against either one, two, or all three of the defendants. The evidence as to the different defendants differs. You will recall the evidence as to each.

If the certificate was true none of them are liable. This certificate is an appraisal of the separate lots: The Falls lot $8,000, the Cox lot $8,000, the Hicks lot $5,000, the Meacham lot $5,000. Were these lots together worth $26,000 on the 18th of December, 1872? If

589 they were worth $26,000, then your verdict must be for defendants; if they were not worth $26,000, and the defendants knew they were not worth it, and the certificate of appraisal was made to raise money on, then the defendants are liable.

If you find one, two, or all of the defendants are liable, the amount for which they are liable will be the same as to one, two, or all of them. If plaintiff is entitled to recover, he is not entitled to recover more than he is injured, nor more than the defendants liable have injured him.

If defendants are liable, they are only liable because they made the representation of value, and can be liable only for what they represented the property to be worth more than it actually was worth. They represented it to be worth $26,000.

It had some actual worth; they cannot be liable beyond the difference; if the difference is more than the plaintiff has lost by loaning on that security, he can only recover to the extent of his loss.

If you find the certificate to be willfully false, and the lots were not worth $26,000, you may find what they were worth and return a

590 verdict for the plaintiff for *for* such difference up to and not exceeding the amount of the mortgage debt and interest less the amount he has received.

Plaintiff must make out material facts necessary to recovering by fair preponderance of evidence. Falsity and wrong intent are not to be presumed, but are to be proved by that measure of proof. The statement of Gordon to Butler at hotel in Potsdam, that he supposed paper

got up by him and Foster and Watkins to get money out of Butler, if he made it as testified to by Butler, not evidence against Foster and Watkins that they got it up for that purpose, but is evidence that Gordon did, and none of his statements, in letters or elsewhere, that they had connection with the transaction are of themselves evidence that they in fact did have such connection.

Statement of Hunt to Butler, that he would rather have $1,000 *dollars* than quarries, only impeaching, if made. So of statement of Smith to Downey, if made. Evidence of parties to be weighed in view
591 of interest. What a party says is evidence against him that the fact is as he says.

The said defendants Watkins & Foster severally duly excepted to that part of the charge which said that the certificate is of importance in this case only as to the four lots, Hicks, Cox, Falls, and Meacham.

The said defendants Watkins and Foster also severally duly excepted to that part of the charge which said that if the defendants were not acquainted sufficiently to fairly have an intelligent judgment according to their judgment, it was false in that respect.

The said defendants Watkins and Foster also severally duly excepted to that part of the charge which said that it is not necessary to find that they intended to cheat the plaintiff or any one out of his money ultimately, and that if they intended to induce some one to advance money relying on the property as sufficient security, although they hoped or expected it would be paid if security in fact failed and the debt is not paid.

The said defendants Watkins and Foster also severally duly excepted to that part of the charge which said, if you find the
592 certificate to be wilfully false, and the lots were not worth $26,000, you may find what they were worth, and return a verdict for the plaintiff for such difference to and not exceeding the amount of the mortgage debt and interest, less the amount he has received.

It is conceded that the computation of interest upon the deficiency arising July 18, 1874, on the sale by the jury was correct.

The cause was thereupon submitted to the jury, who retired to consider upon their verdict, and who afterward, and on the 9th day of July, 1877, returned into court and rendered their verdict, whereby they found in favor of the plaintiff for eleven thousand eight hundred and eighty-one dollars and eighty-eight cents; which verdict was thereupon duly recorded by the clerk, and thereupon, upon motion of the defendants Foster and Watkins, an order was made by the court giving to said defendants Foster and Watkins time to make a case and exceptions to move for a new trial or take a writ of error, as in said order is more specifically set forth.

593–'4 And because none of these things except the order last aforesaid appears of record, the said Hoyt. H. Wheeler, district judge and so forth, hath at Rutland, in the State of Vermont, on this 8th day of August, 1878, settled, signed, and sealed this bill of exceptions, and hereby orders and directs the same to be filed and become a part of the record.

HOYT H. WHEELER.

595–'6 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John G. Butler vs. Edward W. Foster. Impl'd, &c. Bill of exceptions. Filed Sept 17, 1878.

597 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, and Henry Watkins.

It is hereby stipulated that the clerk of this court note in its place, in the body of the bill of exceptions herein, the change noted in the margin thereof at folio 203.

And it is also stipulated that the said plaintiff, John G. Butler, may have the right to produce and use in the argument of the writ of error herein in the Supreme Court of the United States, the original map produced and identified by the witness George Parker; and also that the clerk of this court affix the name of Samuel B. Gordon to the deposition made by him, and also the certificate and name of the commissioner before whom said deposition was taken, so as to correspond with the original deposition filed in the clerk's office.

And it is also stipulated that the case and exceptions on file be, and the same are hereby are, turned into a bill of exceptions, and be
598 attached to and form a part of the judgment record herein.

Dated Potsdam, April 10, 1879.

A. X. PARKER,
Att'y for Pl'ff.
L. W. RUSSELL,
Att'y for Def'ts.

(Endorsed:) U. S. circuit court, north. dist. of N. Y. John G. Butler vs. Edward W. Foster. Stipulation. L. W. Russell, att'y for def'ts. Canton, N. Y. Filed May 21, 1879.

599 In the circuit court of the United States for the northern district of New York.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON, EDWARD W. FOSTER, and Henry Watkins.

On reading and filing the stipulation of April 10th, 1879, between the parties, and also on the order of July 9th, 1877—

It is hereby ordered that the plaintiff, John G. Butler, may have the right to produce and use on the argument of the writ of error herein, in the Supreme Court of the United States, the original map produced and identified by the witness George Parker; that the name of Samuel B. Gordon be affixed by the clerk of this court to the copy of the deposition in the bill of exceptions; that the certificate and name of the commissioner before whom said deposition was taken be also affixed by the clerk so as to correspond with the original deposition filed
600 in the clerk's office; and it is further ordered that the case and exceptions, as settled and on file herein, be, and the same hereby are, turned into a bill of exceptions, and be attached to and form a part of the judgment record herein.

Dated May 20, 1879.

(Endorsed:) In the circuit court of the U. S. for the north. district of

New York. John G. Butler vs. Edward W. Foster et al. Order, changing case, &c., into bill of exceptions, &c. Lester W. Russell, att'y for def'ts. Canton, N. Y. Filed May 21, 1879.

601 United States circuit court, northern district of New York, June term, 1878.

JOHN G. BUTLER
vs.
EDWARD W. FOSTER, HENRY WATKINS, Samuel B. Gordon.

This cause has been heard on the motion of the defendants Foster and Watkins for a new trial, after verdict for the plaintiff at June term, 1877.

The action appears, in scope and effect, to be the same as a common-law action on the case for deceit. The ground on which such an action might rest was well stated by Croke, J., in Bailey vs. Merrill, 3 Bulstr. 95, to be that fraud without damage or damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth. (2 Kent Com., 489; Addison on Torts, § 1174; White vs. Merritt, 7 N. Y., 352). By fraud here is meant an intention to deceive, from whatever motive arising. (Le Blanc, J., in Hay-
602 craft vs. Creasy, 2 Edst., 108, 2 Kent, 489n). These principles have been very frequently applied in actions for giving false credit to traders. (Pasley vs. Freeman, 3 T. R., 51; Eyre vs. Dunsford, 1 East., 318; Vernon vs. Keys, 12 East., 632; Tryon vs. Whitmarsh, 1 Met., 1; Ward vs. Center, 3 Johns., 271.) This action is very much like those of that sort. There the gist of the action is the fraudulent representation by the defendant that a person is entitled to credit; here the foundation of the complaint is that the defendants fraudulently represented that certain property was entitled to credit. The grounds on which they are maintainable are the same, namely, fraud in the defendants, and resulting damage to the plaintiffs. Kent, Ch. J., in Upton vs. Vail, said of Pasley vs. Freeman: "The case went, not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and per-
603 manent a principle as any in our whole jurisprudence." Whether this action can be maintained depends upon whether the fraud of the defendants, in the sense of the law, and damage therefrom to the plaintiff *as* made out.

The representation by these defendants was in writing, signed by them, that they had resided in the town in and adjoining which the property was situated and been acquainted with it for more than twenty years, and in their best judgment it was worth the sums named. There was no question but that it was made with the intention that it should be used to induce whomsoever it might be presented to advance money on faith in the value of the property; nor but that it was presented to the plaintiff and he did advance money.

If it was false and known by the defendants to be false, the deceit is made out.

The jury have found either that they were not well enough acquainted to have a judgment in regard to the property in respect to its value, or that the judgment they gave was not their best judgment. And
604 not only this, but they had the benefit of their own judgment as

to whether their acquaintance was sufficient to enable them to judge of the value of the property; so that the jury must not only have found that they were not sufficiently acquainted to form an intelligent judgment if the representation was found to be false in that particular, but that they knew that they were not.

The force of the representation lay in the fact that it set forth what purported to be the judgment of men long acquainted with the property. The fact of acquaintance was an important part of it.

Judgment without acquaintance would be no more reliable than acquaintance without judgment.

The jury were so required to find, and in express terms required to find that it was wilfully false, in order to find as they did for the plaintiff. In Addison on Torts, § 1175, it is laid down that "In order to maintain an action for deceit, or for a false and fraudulent represent-
605 ation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a fraud. Whether the defendant has any interest in the assertion he makes or in the matter respecting which it is made is perfectly immaterial." "The general rule appears to be that if any man makes a fraudulent representation for another to act upon, either directly or indirectly, and such representation is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages."

Upon the finding of the jury the actionable fraud on the part of the defendants is made out.

606 The jury have also found that the plaintiff, without any lack of common care and diligence on his part, advanced money on faith of the representation on the property as security, which has almost wholly failed.

According to the principles laid down in the books and cases cited, these findings, if reached on proper evidence, entitle the plaintiff to recover for some amount.

If entitled to recover at all, he is, on common principles, entitled to recover compensation to the extent of the injury for which he recovers. This is not questioned much, if any, but it is claimed that the jury have or may have found more than this.

He advanced his money on the mortgage. By the laws of the State, according to the statements of counsel on each side, he could not bring ejectment and recover possession of the property, but could only proceed to a sale of it. This he did, and the defendants have received the benefit of what it sold for. They were expressly notified of the sale and of his claims in respect to the
607 property and their liability, and had the same right and opportunity to purchase that he had. He bought the property at the sale. Now if he acquired the property by his mortgage, he lost the money and got the property, and could only recover the difference between the money and the value of the property. But he did not so acquire it. He acquired the property at the foreclosure sale by his purchase made then and there, and got by his mortgage only what it brought. Before the sale he had no right to the property, except to have it sold, and have the avails applied on his mortgage. They had

no right in respect to it except to have the avails so applied in discharge of their liability to him. They had no right to require him to buy it. The avails of the sale have been applied according to their right. If he has made anything by the purchase, and whether he has or not has not appeared, it is the result of his own skill and pains, and appears justly to belong to him.

608 The cases cited in behalf of the defendants upon the main question in this case are mostly by buyers against sellers upon representations made on the sales, and although well considered and sound, are not applicable here, except in a general way. The plaintiff was not a purchaser until he purchased at the foreclosure sale, and the defendants have not been sellers at all.

From the considerations already stated, it appears that the requests of the defendants to have the jury charged were complied with so far as the defendants were entitled.

There is no doubt but that they were entitled to have the law stated correctly to the jury, so far as their rights were involved, upon all aspects of the case which their evidence tended to establish, but it is not understood that it was their right to have the instruction given in any particular form of words or in any set terms.

609 Without going through with the requests in detail, it is deemed sufficient for all present purposes to mention that the jury were carefully instructed and cautioned all the way not to find a verdict for the plaintiff unless he had established, by the requisite measure of proof, the wilful falsity of the representation, the intention to induce the advancement of money by it, the inducement of the plaintiff by it to advance his without fault and the failure of the security.

If these things constitute a cause of action, as it is considered they do, they were protected, so far as the court could protect them against being found liable without proof of the necessary facts. The existence of the fraudulent intent in such cases is peculiarly within the province of the jury. (Ward vs. Center, 3 Johns. 271.) It is claimed, however, that, in coming to these findings, the jury had improper evidence before them on the part of the plaintiff, and proper evidence excluded from them on the part of the defendants. If this is true, a new trial should of course be granted.

610 The first question of this sort is upon the admission of the plaintiff's explanation of his meaning of words or phrases in a letter to Gordon, as appears at fol. 149. It is true that the reliance of the plaintiff upon the representations of the defendants was material, and that the letter bore upon that subject in favor of the defendants. But it was written long after the representations were made and he had acted upon them, and was not anything the defendants had acted upon. It was not conclusive evidence of any fact between the parties. As it stood, it tended to show what was in his mind when he wrote it. The defendants were entitled to have it in, but that could not deprive him of the right to meet it, if he could, by explanation, or contradiction even. There was no estoppel by it. What was open for them to prove was open to him to meet, and he only had in this respect the privilege of meeting their proof. The next is as to the admission of the notices of the sale as shown at fol. 215.

611 The principal objection now urged is that they contain recitals of facts, but they were not admitted subject to any specific objection of that sort, nor as evidence of any fact recited. They were admitted as a transaction between the parties relating to the sub-

ject of the suit. It was no more than fair, in view of the plaintiff's claim, that he should give the defendants notice of the claim he made before the sale that they might attend and see that the property brought its full value to save themselves, if they should wish. It is said that they were not parties to the proceedings under which the sale was to be made, which is true. The purpose of the notices appear to be to make them parties, so far as they should have any interest in the result of the sale. This appears to have been proper and does not appear as if it has or could improperly affect the rights of the defendants in any way.

The exclusion of the testimony as to Gordon not being prosecuted for debt is urged as an error. If the representation had been as to his pecuniary responsibility, probably this proof would have been
612 admissible upon the question of the good or bad faith of the defendants, but it was not, it was merely as to the property. There was no issue in the case upon which this question could have any proper hearing.

The same is urged as to the exclusion of evidence concerning the shrinkage of values of property, and especially quarry property in the town where this property was situated, on account of commercial revulsions generally. The effect of commercial revulsions generally would probably be generally known and not the subject of specific proof, but if not, this offer was not confined to the property in controversy. It covered all the property in the town at first and then was left to cover all the property of that kind in town. Such offer acceded to would open an inquiry much too wide. If evidence as to the value of other property was received on one side it would have to be if offered on the other. No evidence as to the value of this property was excluded and that would seem to be as far as the parties were entitled to
613 go. The exception to the admission of the letters as amended is not so broad as the defendants' counsel seem to have supposed. Those admitted subject to objection were admitted with reference to a particular interrogatory specified in the deposition of Gordon by number. In the case as settled the interrogatories in the deposition are not numbered. So the want of connection, if any, is not apparent.

The witness Train had not testified about the specimen from the Parmeter quarry in chief, and so it was not a legitimate subject of cross-examination.

After a careful review of all the points urged on this motion it does not appear but that the defendants had as fair a trial as the court could give them. If there were errors they are not now seen, and there seems to be no way but to leave the questions to the review of the higher tribunal to which the defendants are entitled.

The motion for a new trial is overruled and judgment ordered to be entered on the verdict.

HOYT H. WHEELER.

614 (Endorsed:) U. S. circuit court; north. dist. of N. Y. John G. Butler vs. Edward W. Foster et al. Opinion. Wheeler, J. Filed Sept. 17, 1878.

615 Know all men by these presents that we, Edward W. Foster and Henry Watkins, of Potsdam, in the county of St. Lawrence and State of New York, as principals, and Louisa A. Partridge, Calista S. Partridge, Israel P. Hunt, Horatio S. Munson, Hiram Rodee, Joseph B. Austin, George Eastman, and Charles W. Leete, of Potsdam afore-

said, and Milton D. Packard, of the town of Canton, county of St. Lawrence and State of New York, as sureties, are held and firmly bound unto John G. Butler, of the city of Erie, in the State of Pennsylvania, in the sum of thirty thousand dollars, to be paid to the said John G. Butler, or to his certain attorney, or to his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 11th day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

616 Whereas in a certain action in the circuit court of the United States for the northern district of New York, between the said John G. Butler, plaintiff, and Samuel B. Gordon and the above-bounden Edward W. Foster and Henry Watkins, defendants, judgment was, on the sixth day of December, 1878, rendered in favor of said plaintiff and against the said defendants for the sum of fourteen thousand one hundred and sixty-six dollars and eighty-five cents, and on that day docketed in the office of the clerk of said court;

And whereas the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins have prosecuted a writ of error to the Supreme Court of the United States to reverse the said judgment rendered against them, as aforesaid, by the circuit court of the United States for the northern district of New York:

Now, therefore, the condition of this obligation is such that if the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins

617 shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EDWIN W. FOSTER.	L. S.
HENRY WATKINS.	L. S.
LOUISA A. PARTRIDGE.	L. S.
CALISTA S. PARTRIDGE.	L. S.
D. P. HUNT.	L. S.
HORATIO S. MUNSON.	L. S.
HIRAM RODEE.	L. S.
J. B. AUSTIN.	L. S.
GEO. L. EASTMAN.	L. S.
CHAS. W. LEETE.	L. S.
M. H. PACKARD.	L. S.

Sealed and delivered in the presence of—
GEORGE L. ERWIN.

618 UNITED STATES OF AMERICA,
State of New York, Northern District of New York,
County of St. Lawrence, ss:

Be it remembered that on this eleventh day of December, 1878, before me, the subscriber, personally came Edward W. Foster, Henry Watkins, Louisa A. Partridge, Calista S. Partridge, Israel P. Hunt, Horatio S. Munson, Hiram Rodée, Joseph B. Austin, George L. Eastman, Charles W. Leete, and Milton D. Packard, to me severally and personally known to be the same persons mentioned and described in and who executed the foregoing instrument, and to me duly and severally acknowledged that they executed the same.

[L. S.] GEORGE Z. ERWIN,
U. S. Commissioner of the Circuit Court in & for the Northern Dist. of New York.

619 UNITED STATES OF AMERICA,
Northern District of New York, County of St. Lawrence:

Milton D. Packard, of Canton, in said county, being duly sworn, deposes and says that he is a freeholder and citizen of said county and State, and is worth in property not exempt from levy and sale under execution, and over and above all debts and liabilities which he owes or has incurred, the sum of ten thousand dollars.

W. D. PACKARD.

Sworn to before me this 11th of December, 1878.
[L. S.] GEO. Z. ERWIN,
U. S. Commissioner of the Circuit Court in and for the Northern District of New York.

620 UNITED STATES OF AMERICA,
Northern District of New York, County of St. Lawrence, ss:

Israel P. Hunt, Horatio S. Munson, Hiram Rodee, Joseph B. Austin, George L. Eastman, and Charles W. Leete, of Potsdam, in said county, being duly and severally sworn, depose and say and each for himself saith that he is a freeholder of said county and State and citizens thereof, except the said Israel P. Hunt, who is a householder in said county, and is worth in property not exempt by law from levy and sale under execution, and over and above all debts and liabilities which he owes or has incurred, the sum of five thousand dollars.

I. P. HUNT.
HORATIO S. MUNSON.
HIRAM RODEE.
J. B. AUSTIN.
GEO. L. EASTMAN.
CHAS. W. LEETE.

Sworn to before me this 11th December, 1878.
[L. S.] GEORGE Z. ERWIN,
U. S. Commissioner of the Circuit Court in and for the Northern Dist. of New York.

621 UNITED STATES OF AMERICA,
Northern District of New York, County of St. Lawrence, ss:

Louisa A. Partridge and Calista S. Partridge, of Potsdam, in said county, being duly and severally sworn, depose and say and each for herself saith that she is a freeholder of said county and State, and is worth in property not exempt by law from levy and sale under execution, and over and above all debts and liabilities which she owes or has incurred, the sum of ten thousand dollars.

LOUISA A. PARTRIDGE.
CALISTA S. PARTRIDGE.

Sworn to before me this 11th December, 1878.
[L. S.] GEORGE Z. ERWIN,
U. S. Commissioner of the Circuit Court in and for the Northern Dist. of New York.

The foregoing bond is approved Dec. 13, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

622 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John G. Butler vs. Samuel B. Gordon et al. Bond on writ of error. Filed December 16, 1878, 11 o'cl'k a. m.

623 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between John G. Butler, plaintiff, and Samuel B. Gordon, Edward W. Foster and Henry Watkins, defendants, a manifest error has happened to the great damage of the said Samuel B. Gordon, Edward W. Foster and Henry Watkins, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme
624 Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] CHARLES MASON,
Clerk of the U. S. Circuit Court for the Northern District of New York.

The foregoing writ is allowed Dec. 13, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

LESLIE W. RUSSELL,
Attorney for Plaintiffs in Error, Canton, St. Lawrence County, State of New York.

625–'6 (Indorsed:) U. S. Supreme Court. John G. Butler vs. Samuel B. Gordon et al. Writ of error. Leslie W. Russell, attorney for plaintiffs in error. Canton, St. Lawrence County, State of New York. Filed December 16, 1878, 11 o'clock a. m.

627–'8 UNITED STATES OF AMERICA, *ss:*

To John G. Butler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Samuel B. Gordon, Edward W. Foster and Henry Watkins are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 13th day of December, 1878.

SAM'L BLATCHFORD,
Circuit Judge.

629 In the circuit court of the U. S. for the northern district of N. Y.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Joseph B. Erwin, being duly duly sworn, says that he is over the age of 21 years; that he knows the above-named John G. Butler, plaintiff & defendant in error in the above-entitled action; that on the 22d day of January, 1879, at Potsdam, N. Y., he served personally on the said John G. Butler the within citation by showing him this original citation, & at the same time leaving a copy thereof with the said Butler.

JOSEPH B. ERWIN.

Sworn & subscribed before me this 27th day of January, 1879.
[SEAL] GEORGE Z. ERWIN,
U. S. Commissioner.

630 (Indorsed:) In the Supreme Court of the United States. Samuel B. Gordon, Edward W. Foster, & Henry Watkins, plaintiffs in error, vs. John G. Butler, defendant in error. Citation. Leslie W. Russell, attorney for pl'ffs in error. Canton, N. Y.

(In pencil:) Served personally by copy on J. G. Butler, Jan'y 22, '79.
By J. B. ERWIN,
At Potsdam.

Filed June 19, 1879.

631 Supreme Court of the United States.

SAMUEL B. GORDON, EDWARD W. FOSTER, and HENRY WATKINS, plaintiffs in error,
vs.
JOHN G. BUTLER, DEFENDANT IN ERROR.

Of October term, in the year of our Lord one thousand eight hundred and seventy-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins, by Leslie W. Russell, their attorney, and say that in the record there is manifest error, in this, to wit, that by the record aforesaid it appears that the said circuit court found and determined, as matter of law, upon the facts found by the court and stated in said record, that the plaintiff in said action, the said John G. Butler, was entitled to judgment; whereas upon the facts so found the said plaintiff, by the law of the land, was not entitled to judgment.

There is also a manifest error in this, to wit, that by the rec-
632 ord aforesaid it appears that the judgment aforesaid given was given for the said John G. Butler against the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins.

Whereas by the law of the land the judgment ought to have been

given for the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins, against the said John G. Butler.

And the said Samuel B. Gordon, Edward W. Foster, and Henry Watkins pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of the said judgment.

LESLIE W. RUSSELL,
Attorney for the Plaintiffs in Error.

633 In the circuit court of the U. S. for the northern district of N. Y.

JOHN G. BUTLER
vs.
SAMUEL B. GORDON ET AL.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Joseph B. Erwin, being duly sworn, says that he is over the age of 21 years; that he knows the above-named John G. Butler, plaintiff & defendant in error in the above-entitled action; that on the 22d day of January, 1879, at Potsdam, N. Y., he served personally on the said John G. Butler the within assignment of error by delivering to and leaving with him a true copy thereof.

JOSEPH B. ERWIN.

Sworn & subscribed before me this 27th day of January, 1879.
[SEAL.] GEO. Z. ERWIN,
U. S. Commissioner.

634 (Indorsed:) In the Supreme Court of the United States. Samuel B. Gordon, Edward W. Foster, & Henry Watkins, plaintiffs in error, vs. John G. Butler, defendant in error. Assignment of errors. Leslie W. Russell, attorney for plaintiffs in error, Canton, N. Y. Original.

(In pencil:) Served personally by copy on J. G. Butler, January 22, '79.

By J. B. ERWIN,
At Potsdam.

635 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, William H. Bright, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of John G. Butler vs. Samuel B. Gordon, Edward W. Foster, and Henry Watkins.

In testimony whereof I have hereunto set my hand and duly affixed the seal of said court at the city of Utica, in said northern district of New York, this third day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL.] W. H. BRIGHT, *Clerk.*

(Indorsement on cover:) No. 254. Samuel B. Gordon, Edward W. Foster, and Henry Watkins, pl'ffs in error, vs. John G. Butler. N. New York C. C. U. S. Filed 20th September, 1879.

MAR 22 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 254.

Error to the Circuit Court of the United States

FOR THE NORTHERN DISTRICT OF NEW YORK.

SAMUEL B. GORDON, EDWARD W. FOSTER, and HENRY WATKINS, Plaintiffs in Error,

against

JOHN G. BUTLER, Defendant in Error.

PLAINTIFFS' BRIEF.

LESLIE W. RUSSELL,
Counsel for Plaintiffs in Error.

this allegation, except by evidence tending to show that the stone known as the Potsdam Sandstone, of which there was concededly an abundance in the quarry-lots, was not valuable for building or commercial purposes, and the evidence by which this was sought to be proved was almost entirely of that class supposed to be expert testimony. The quarries upon which the mortgage was given never had been developed prior to the trial, although one called the Parmeter quarry, below and adjoining them on the river, had been developed for thirty or forty years, and, to the common eye, they contained the same quantity and quality of stone as that one, which had been proven to be satisfactory by actual experience.

The case, therefore, as submitted to the jury by the learned Judge, became one upon which the liability of the defendants was made to rest upon the questions:

First. Was the certificate false in regard to valuation?

Second. If false, did the defendants know it to be false, or did they know that they had not sufficient knowledge of the value of the quarries to form a correct judgment?

Upon the issues so submitted, the jury must inferentially be deemed to have found that the quarry-lots were not of the value represented, but how much their value was, as found by the jury, is not apparent; and must also have found that the defendants knew, at the time of signing the certificate, their valuation to be false, or knew that they did not have a sufficient judgment to form a correct opinion.

It is conceded in the case that the lots were valued by all the parties not as agricultural lands, but as sandstone lots, and any valuation put by anybody upon them must necessarily be highly speculative. There is no proof in the case that the defendants knew their valuation to be false, unless the opinions of other

witnesses, that such valuations were too large, is evidence from which their knowledge can be presumed; and there is not the slightest evidence in the case that the defendants knew that they did not have a sufficient knowledge to be able to give an opinion as to the value—especially as it was not claimed by the defendant in error that he relied upon their opinion as, or that they held themselves out to be, experts in such business.

The plaintiff had for many years been a commercial traveler in the liquor business, visiting Potsdam and vicinity in his rounds, where he became acquainted with the defendant Gordon, who was a lawyer in practice at Potsdam, and from the time of the beginning of their acquaintance a close business and social intimacy arose between them. Gordon became Butler's attorney, and acted as such for many years, and the evidence disclosed indubitably that each was very desirous of assisting the other in business ventures.

About the beginning of the war, Butler became a merchant on his own account and acquired a large amount of means, still continuing, however, his business, which, shortly before the time of the occurrences in controversy, he desired to sell to Gordon. He was quite familiar with Gordon and his circumstances, and also knew something about the sandstone quarries in Potsdam.

Gordon, at the time the certificate was signed, was a man of pecuniary responsibility, and worth upwards of $30,000, above his liabilities. Butler was then entrusting, and had for years entrusted, him with large sums of money to loan for him, and also employed him to collect the loans and interest, even to the extent of mingling the funds received with his own and remitting by his own personal check.

For several years prior to 1872, Gordon had been carefully acquiring the various quarry lots in Potsdam

with the undoubted belief that they were to be very valuable on development, the stone having been used sufficiently in various places to demonstrate that it was valuable for building purposes. He was evidently thoroughly in earnest in the belief that a fortune was to be made out of the sandstone business at Potsdam, and out of quarries which he controlled, as evidenced by his confidential letters and by his investing in the business every cent that he could possibly raise. His friendly relations with Butler were such that at first he was very desirous of engaging with him in the business, but finally concluded to simply obtain a loan, as Butler was willing to make the loan, and not willing to invest otherwise, although, as Butler thought, it was likely to be profitable.

From December, 1871, by means of letters from Gordon, down to the time of the actual loan, Butler was fully advised and informed by Gordon that the property, upon which he afterward made his loan, was such that no man, no matter how perfect his judgment, could estimate it as other property, or put a valuation upon it that might not be highly incorrect, and that, necessarily, the property had no actual market value.

He was also advised that Gordon was anxious to embark in this speculative enterprise of developing untried quarries, believing that he might get rich out of it, but also recognizing the possibility that on account of its being a speculation and a risk, it might prove disastrous in the extreme, by the sole contingency which could render it such, namely, that the property itself proved upon development to be valueless.

He was also advised that none of the quarries named in the certificate, except one, (and that one not to be included in the mortgage), had been developed or tried to ascertain their value, and that the other quarry lots

out of which, with Butler's aid, he expected to make his money with the help of that which had been already tried, was the precise property upon which the loan was to be made.

(Letter of December 28th, 1871, fol. 147, *et seq;* letter of November 30th, 1872, fol. 80, *et seq;* letter of October 31st, 1872, fol. 58, *et seq;* and see, generally, letters of Gordon to Butler and Butler to Gordon, from fol. 63 to 112; also 121–157, 540–573, and deposition of Gordon, 349, *et seq.*).

It is evident, therefore, that Butler knew, when Watkins and Foster signed the certificate, they could only judge by the superficial indication of an outcropping rock, which, as the entire testimony shows, contained all the external *indicia* which marked the Parmeter quarry, where it was not uncovered. They were not estimating ordinary marketable property, but giving most hypothetical of opinions upon which to base a pecuniary transaction.

He also knew, from Gordon's information to him, that the cost of the quarry was far below the estimates given, and, therefore, as well as from the expressions of Gordon, and anticipations entertained by him, that the speculative valuations were based entirely upon hopes of success in a projected enterprise.

He was also informed that the very men who signed this certificate were interested to a small degree in the result of the enterprise, even to the receiving of the trifling amount of stock which they were shown to have possessed, and that their certificate could in no sense be considered a disinterested valuation of marketable property.

He, therefore, knew that the scheme of Gordon was a venture which embraced the uncertainty of a sufficient demand for that character and class of stone, a profitable market, as well as finding sufficient quantities to satisfy the demand with sufficient ease and

economy of working, to leave a remunerative margin.

It also appears that Butler never asked for the certificate, and that he relied upon Gordon in making the loan and his intimacy with him, and made the loan out of friendship; that he never asked for or obtained any search showing the condition of the title, whether the land was owned by Gordon, or whether there were any incumbrances upon it—facts which were far more necessary to know than the opinion of any one as to value.

He delivered also the check for $10,000 before the mortgage was treated as delivered, the Orchard lot not being included, and took Gordon's promise to deliver a mortgage with that lot included.

He was also informed that the whole of the quarries were to be turned over to a new company, which was to be formed, for $40,000 of stock, which was to be sold for fifty per cent. cash, so that, in reality, the appraisal, when it came to anything like a business valuation, was that the whole of the quarries estimated at $48,000 were not worth in cash over $20,000, and, therefore, that the ones upon which he took the mortgage were worth, even according to their estimate, but little over $10,000.

The defendant in error sought to show by the testimony of geologists, the probable character of the material inside of the quarry lots, which, of course, was not discernible to the common eye; and by laborers on one or two of the quarry-lots, the probable value of the stone. Conflicting evidence was given by the witnesses upon both sides, of the estimates of value, those offered by the plaintiffs in error estimating the value of the lots as high or higher than the values named in the certificate, and these valuations were made at different periods from the time of the certificate down to the time of the trial (fols. 268–9, 257–284, 186–243).

No evidence was given to show that the plaintiffs in error knew their assertion of value to be false, or of any *scienter*, except that one Hitchins testified that Watkins said, during the proposed formation of the Sandstone Company, that he regarded the upper lots chiefly of value in order to control the market, showing that he regarded the stone in those lots as valuable enough for competition with the others, if developed; and the remark made by him, months after the loan was made, expressing disappointment with the results of the Cox quarry, which was being opened at the time; and the further remark by Foster, testified to by Butler, over a year afterwards, at a time when the business venture had proved disastrous, that when he made the appraisal, he supposed the property was going to be developed.

The loan was made by Butler in January, 1873, and Gordon proceeded at once to rapidly develop the sandstone business, and got just fairly under way at the time of the commercial crash, in September, 1873, which, by the cessation of business enterprises, the sudden call of creditors for money, and the general distrust with which business ventures, depending somewhat upon credit, were regarded, brought financial ruin to Gordon and his enterprise. With his failure, of course the quarry enterprise also failed; and being no longer sustained by sales, the value of the property at once and suddenly diminished. Gordon's struggles to save himself and his enterprise, caused upon a review of the scheme, made, after the light of the business panic and the huge reduction in values, occasion for suspicion, which stood with the jury for proof of bad faith, not only on Gordon's part, but on the part of Watkins and Foster.

The defendant in error, availing himself of the clause making the whole amount of his mortgage due for non-payment of interest, commenced foreclosure

proceedings, to which Watkins and Foster were strangers, and, as those proceedings progressed to a sale of the premises, as he alleges, gave them written notice that he claimed they were guilty of fraud upon him in making the appraisal or valuation, and insisted upon their paying him the amount of the mortgage, interest, costs, etc., placing his notice in such a form that any action on their part, in response to it, must necessarily be an admission of guilt.

Butler caused the premises to be sold to himself, upon a nominal bid $1,500, the sale being had on the 18th day of July, 1874 (fols. 158–186).

He thereupon began this action against the three plaintiffs in error, and was allowed to recover the difference between the net sum realized upon his sale and the amount of his loan and interest, the learned Judge holding that the sum realized upon the auction sale was conclusive against the plaintiffs in error, though they were not parties to the suit.

The foregoing statement of facts is sufficient to elucidate the questions of law which were raised upon the trial, and which are stated in the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The Court erred in denying the motion, at the close of the case for the plaintiff below, to direct the jury to find for the defendants (pp. 77, 78).

2. The Court erred in denying the request at page 199, 200, to instruct the jury that the evidence in the case, and all the inferences that can properly be drawn therefrom, are not sufficient in law to prove the cause of action, alleged in the declaration, against the defendants Foster and Watkins, and the verdict of the jury should be in their favor.

3. The Court erred in refusing to charge the jury, according to the request at pp. 199–200, to instruct the

jury that the evidence in the case, and all the inferences that could be properly drawn therefrom, are not sufficient in law to prove any cause of action against the defendants Foster and Watkins, and the verdict of the jury should be in their favor.

4. The Court erred in refusing to charge the jury, according to the request at p. 200, that the plaintiff cannot recover upon the findings of the jury, that the defendants Foster and Watkins were mistaken in the value they gave to the lots, even though they find that they knew such value to be incorrectly stated.

5. The Court erred in refusing to charge the jury, according to the request at p. 200, that the plaintiff cannot recover upon the findings of the jury, that the defendants Foster and Watkins were mistaken in the value they gave to the lots, even though they had good reason to believe such value to be incorrectly stated.

6. The Court erred in refusing to charge the jury, according to the request at pp. 200, 201, that unless the jury find from the evidence that all the defendants agreed and conspired together to cheat and defraud the plaintiff, by having the defendants Foster and Watkins make the certificate offered in evidence, and to therein represent the quarries and quarry lots to be worth more than they really believed them to be worth, and that pursuant to said agreement, and with intent to cheat and defraud the plaintiff, the defendants Foster and Watkins did make such certificate, and did therein value said quarries and quarry lots, or some of them, at a sum greater than they believed them to be worth; and that the defendant Gordon used such certificate to obtain the loan of plaintiff, pursuant to such conspiracy and agreement; and such loan was made to said Gordon upon the strength of such certificate, the said plaintiff cannot recover.

7. The Court erred in refusing to charge the jury,

according to the request at p. 201, if the conspiracy substantially as set forth in the declaration, is not proven to the satisfaction of the jury, plaintiff cannot recover.

8. The Court erred in refusing to charge the jury, according to the request at page 201, that to find that there was a conspiracy, the jury must be satisfied from the evidence that all of the defendants corruptly, and with intent to cheat and defraud the plaintiff, agreed together to cheat and defraud the plaintiff by means of the certiffcate.

9. The Court erred in refusing to charge the jury, according to the request at p. 201, that the jury are not bound by the amount realized from the property at foreclosure sale, but may find from the evidence that the value of the security at that time was equal to or in excess of the amount due upon the mortgage, and costs of foreclosure.

10. The Court erred in refusing to charge the jury, according to the request at p. 201, that in case the jury find that the value of the security, at the time of foreclosure sale, was equal to or in excess of the amount due upon the mortgage and the costs of foreclosure, then plaintiff cannot recover.

11. The Court erred in refusing to charge the jury, according to the request at p. 201, that in case the jury find that the value of the security, at the time the certificate was made, was equal to or in excess of the amount of the mortgage and the costs of foreclosure, the plaintiff cannot recover.

12. The Court erred in charging the jury, as transcribed on p. 202, exception on p. 204, that the cerciificate is important in this case only as to the four lots—Hicks, Cox, Falls, and Meacham.

13. The Court erred in charging the jury, as transcribed on p. 202, exception on p. 204, that if the defendants Watkins and Foster were not acquainted

sufficiently to fairly form an intelligent judgment, according to their judgment, the certificate was false in that respect.

14. The Court erred in charging the jury, as transcribed on p. 203, exception on p. 204, that it is not necessary to find they intended to cheat the plaintiff, or any one, out of his money ultimately, if they intended to induce some one to advance money, relying on the property as security, it is sufficient, although they hoped and expected it would be paid if the security in fact failed, and the debt is not paid.

15. The Court erred in charging the jury, as transcribed on p. 203, exception on p. 204, if you find the certificate to be wilfully false, and the lots were not worth $26,000, you may find what they were worth, and return a verdict for the plaintiff for such difference, up to and not exceeding the amount of the mortgage debt and interest, less the amount he has received.

16. The Court erred in overruling the objection to, and refusing to strike out the testimony of Butler, at p. 42, as to the conversation between Gordon and Butler, at Potsdam, in the summer of 1874; that Gordon supposed the certificate was got up to get money out of Butler, and that he supposed Foster and Watkins knew it.

17. The Court erred in refusing to strike out, on motion of Foster and Watkins, the remark of Gordon to Butler, testified to as being made in that conversation, in answer to Butler's question, "Didn't Foster and Watkins know it?" that "he supposed they did."

18. The Court erred in overruling the objection to the testimony of Butler, at p. 50, that from Jan. 14, 1873, to July, 1873, all he loaned realized eleven and one-third per cent. interest; that he got from Gordon only seven per cent. interest, and supposed he got as good security, and only that per cent., and when he accom-

modated him in that way, it was the definition of friendship that appeared in his letter; that he knows that this letter of Nov. 8, 1872, did not refer to any of the quarries in the certificate.

19. The Court erred in overruling the objection, at p. 53, made by the defendants to the judgment roll in the foreclosure proceedings upon the mortgage taken by Butler.

20. The Court erred in overruling the defendants' objection, p. 53, to the introduction of the referee's report of sale.

21. The Court erred in overruling the several objections of the defendants, at p. 55, to the admission of the two offers, alleged to have been served upon Watkins and Foster, set forth at length at pp. 55, 56, 57, 58 and 59.

22. The Court erred in overruling the objections, pp. 63–4, to the testimony of the witness Post, that he paid $25 a year for the use of the lots rented by him of Butler.

23. The Court erred in sustaining the objection of plaintiff and excluding the evidence offered by defendants, on p. 86, that at the time of the making and delivery of the said certificate, the said Gordon was not prosecuted for debt by legal process.

24. The Court erred in sustaining the objection of the plaintiff and excluding the evidence offered, to be proven, by the defendants, at p. 86, that the witness Cox had been acquainted with the value of the property at Potsdam and vicinity for twenty years past, and that there was a large shrinkage in real estate in the whole of that town between Dec. 1872, and July 18th, 1874, on account of the commercial revulsions generally.

25. The Court erred in sustaining the objection of the plaintiff and excluding the evidence offered, to be proven by the defendants, at p. 86, as contained in the

last preceding offer, confining the shrinkage to quarry property in Potsdam for the same causes.

26. The Court erred in overruling the objections of defendants, at p. 192, to the letter of August 19, 1873, and in admitting the said letter to be read in evidence.

ARGUMENT.

I.

It is a well known rule in the trial of causes, recognized by the Federal Courts, that, conceding all the inferences which a jury could justifiably draw from the evidence, if it would be insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury.

Pleasant vs. Fants, 22 Wall., 122.
Bank of Washington vs. Triplet, 1 Peters, 21.

The first three assignments of error may, therefore, properly be considered as embracing propositions of law which can be fairly considered together. If the plaintiff below had not adduced sufficient testimony to maintain his cause of action, the ruling of the Court in each of the respects mentioned was incorrect.

In determining the question which arises in a case of the kind at bar, we must necessarily assume that, while fraud and deceit are not supported by the law, yet the ethical or moral rule is not the one which is adopted by the courts as a basis for administering relief. The tendency of the courts, therefore, is to administer relief only in those cases where the alleged representations are as to matters of fact, which may be seen or observed, and as to which fairly satisfactory proof may be made of the deception as well as the intent to deceive. Allegations of fraud upon mere

statements of opinion or judgment are not favorably regarded by the courts, both because of the intrinsic difficulty in allowing due weight to errors of judgment and because such statements are not sufficiently certain in their character to be made the basis of actual fraud and recognized as such by the law.

Such opinions are not deemed fraudulent, even as to matters of common observation, and, *a fortiori*, they should not be in matters like those which form the basis of this controversy, in which the opinion must necessarily be of the valuation of a highly speculative class of property, which one man might, as the evidence discloses, regard as worthless, and another of great value, according to the hypothetical estimate each might entertain of the use to which, by development and favorable circumstances, the property might be put.

And it is absolutely necessary for the courts, so far as possible, to lay down fixed rules for the guidance of juries in such cases; for, to give a case to the jury, which may be surrounded by elements of plausible suspicion, but yet which in reality contains nothing but mistaken opinions, is to afford to them the power of rendering gross injustice, and of adjudging that to be a fraud to their unaccustomed reasoning, which the intelligent and correct judgment of a Court would pronounce otherwise.

In the present case, a cold scrutiny of the entire evidence which may be considered upon the motion to direct the jury, reveals that the alleged opinion of the defendants Foster and Watkins could not be a mistaken, or certainly a fraudulently deceptive opinion, unless it is proven to be such by the further opinions of the witnesses, who have given their judgment and estimate as to the value of the property. Or, in other words, the statement of the first opinion must be proven to be a fraud, if at all, by the sworn statement

of secondary opinions upon the same subject matter.

The argument is that Foster and Watkins lied when they said that in their judgment the property was worth $48,000, or $26,000, because Peter Post and others say upon the witness stand that in their judgment, enlightened by the commercial revulsion which transpired after the first opinion was given, the opinion of Foster and Watkins was incorrect.

It would seem that the bare statement of the case would be sufficient to justify the reversal of the judgment, but reference is made to leading cases upon the subject in order to fortify the position we take, and in arguing this case, I assume that the word *judgment* is equivalent to the word *opinion*, as a correlative term.

To illustrate, from a case which was decided by the highest court of the forum in which this action was tried (I refer to the case of Ellis vs. Andrews, 56 N. Y., 83): The action was for fraud. The complaint alleged that the defendants fraudulently stated in substance to the plaintiff, that the stock of the Congress and Empire Springs Company was worth at least 80 per cent. upon the par value thereof, which statement plaintiff then and there believed to be true, and relying thereupon, purchased from said defendant $25,000 of said stock and paid therefor $20,000 in cash, or its equivalent, whereas in truth and in fact, the said stock was not then worth over 40 per cent., and which fact was then well known to said defendant, whereby the said plaintiff sustained damages, etc.

Upon the trial of the action, after the plaintiff's counsel opened the case to the jury, the defendant's counsel moved that the complaint be dismissed on the ground that it did not state facts sufficient to constitute a cause of action. The complaint was dismissed thereupon by the Court, and an appeal taken from the decision made at General Term to the Court of

Appeals. The Court thereupon decided that the dismissal of the complaint must be sustained, on the ground that a false statement as to the value of property made by a vendor for the purpose of obtaining a higher price than he knows the property is worth, will not sustain an action for fraud by a purchaser, who contracted, relying upon the statement. The purchaser must rely upon his own judgment as to value.

The same principle was substantially decided in

Oberlander vs. Spies, 45 N. Y., 175.
Myers vs. Amidon, 45 N. Y. 169.
See also Story's Equity, Sec. 197, Note 1.
Parker vs. Moulton, 114 Mass., 99.
Holbrook vs. Connor, 60 Me., 578.

In Holbrook vs. Connor, *supra*, the declaration was on the case for deceit for fraud in the sale of land. The plaintiff alleged that he was induced to enter into a joint stock company and to subscribe for and buy the lands in question, by the false and fraudulent representations of the defendant, the vendor, that the said lands had large deposits of oil in them and were of great value for the purpose of digging, boring for and manufacturing oil. It appeared that when the representations were made, there was but one mill on the land in question; that other mills had been opened upon the lands in the neighborhood; that plaintiff understood at the time the representations were made that the lands had not been tested; that operations upon them might be unsuccessful; that he expected to suffer loss, if he did not find oil or if oil went down.

The Court held that the representations were matters of opinion, and that the trial court should have so pronounced from the evidence, without leaving the matter to the jury as a matter of fact, to determine whether the statement was understood as a matter of opinion, or the representation of a fact.

In Parker vs. Moulton, *supra*, the declaration set forth that the defendant, intending to defraud the plaintiff, represented that he owned a dwelling house, in good repair and well furnished, upon a lot of land in Somerville, of the value of $2,000, with several other lots of land in Melrose, each of the value of $200; that plaintiff had not been to see those lots, but relying upon the representations of the defendant, agreed to exchange certain real estate which he owned in Canada for the defendant's land in Somerville and Melrose, and to pay him a sum of money, secured by a note and mortgage on the Somerville property; that he delivered to the defendant a deed of the Canada land, and left with a third party the note and mortgage to be delivered when the deed of the Melrose property was delivered to him by the defendant; that defendant fraudulently obtained the plaintiff's note and mortgage without giving or offering to give any deed of the Melrose property, and concluded by charging that all the representations as to the condition and finish of the dwelling house in Somerville, and as to the character and situation of the Melrose property, and the value of the several lots, were false and fraudulent.

On demurrer, to the declaration, the Court held that the representations were matters of opinion and judgment, and would not sustain an action of fraud, although the defendant knew them to be false when made.

There certainly can be no distinction so far as this rule is concerned, which allows an action to be maintained in case of a loan upon mortgage, and would not upon a sale, for a mortgage is a defeasible conveyance, and the rule of *caveat emptor* applies as well to the one as the other.

Broom's Legal Maxims, 744.
Bree vs. Holbeck, Dougl., 655.

6 T. R., 606.
1 Marsh. R., 163.
2 Blackstone's Com., 157.
1 Pow. on Mort., by Cor., 4 N. B.

Of course, the rule should apply more powerfully in case of a mortgage, as the lender has some security beyond the lien, that of the personal obligation of the borrower.

The only responsibility of Foster and Watkins in the case for any active participation in the alleged wrong upon Butler is on account of their signatures to the certificate. If that is not sufficient, under the evidence in the case, to form the basis of a legal fraud, the action must fail.

II.

In addition to the false assertion of a fact, the defendant in error must prove that the plaintiffs in error knew their statements to be false, and prove this affirmatively.

Marsh vs. Falkner, 40 N. Y., 566.
Wakeman vs. Dailey, 51 N. Y., 27.
Hubbell vs. Myers, 50 N. Y., 480.
Willson vs. Luling, 46 How. Pr., 350.
Lord vs. Godard, 13 How. U. S., 210, 211.
Pearsons vs. Howe, 1 Allen, 207.

In the case of Marsh vs. Falkner, *supra*, it appeared that plaintiff told defendant that K. had applied to him to purchase certain goods on credit, and wanted to know if K. was responsible. Defendant stated on the 8th or 12th of January, 1860, that K. was perfectly good, good for $17,000 to $18,000 in property in Syracuse, and that if plaintiff took K.'s note, he, defendant, would discount it; thereupon plaintiff sold K. the goods. K. had real estate, encumbered to its full value, and was in fact insolvent. Defendant was a

trader, engaged in the same kind of business, and residing in the same city with K.; was shown to have been intimately connected with him in business transactions; bought and sold goods with him on joint account, and lent him money every week. Defendant made a trade for K.'s stock of goods, and three or four days after K. left the country.

Defendant testified that he did not know of K.'s intention to leave when he bought the goods, but was informed of it about an hour afterwards. A motion was made to non-suit the plaintiff, and denied, and a verdict given for the plaintiff for the alleged false representations and deceit. On appeal, the General Term of the Supreme Court reversed the judgment, on the ground that the motion for a non-suit should have been granted for the reason that the defendant was not shown to have known the representations to be untrue, and on appeal by plaintiff to the Court of Appeals, the judgment of the General Term was affirmed on the same ground.

In Wakeman vs. Dailey, *supra*, the defendant was sued for fraudulently inducing the plaintiff to subscribe $30,000 to the capital stock, or to purchase that amount of capital stock, by the false and fraudulent representation that the company had a paid up cash capital of $150,000. No affirmative proof was made that the defendant knew the representation to be false, though he was a director of the company, and it was proven to have no capital at all, in fact. Yet it was held he was not liable, the *scienter* not having been affirmatively proven.

III.

If it is possible, however, to make any answer to the positions we assume, that answer can only be based upon the ground that though the certificate was apparently in form the expression of an opinion, yet it was a part of the conspiracy between the three to trick the plaintiff out of his property by the use of the certificate, and that as a part of the conspiracy between the three it was an important factor in determining the responsibility of the defendants Foster and Watkins.

The argument is untenable, but if it be worthy of consideration, its force is entirely obviated by the refusal of the Court to charge as requested at pp. 200, 201, that the plaintiff must prove a conspiracy substantially set forth in the declaration in order to recover.

The refusal to charge either one of the two several requests in this respect offered by the defendants, was error. The defendant in error brought the plaintiffs in error into court upon the charge of conspiracy alone, and he must recover *secundum allegata, et probata*. This is true independently of all other considerations, and more especially does it have force and weight in view of the argument upon which the certificate is sought to be made a basis of the charge of fraud. The learned Judge, in denying our request, ruled substantially to the jury, "You may find these parties guilty of fraud, although there never was a conspiracy to defraud; each one may have intended upon his own motion to defraud the plaintiff, and the certificate be signed in accordance with such intent."

This disposes of the charge of a concerted trick, and leaves the liability of the plaintiffs in error entirely upon the certificate, resting alone upon the mere state-

13 How 210. 211.

ment of an opinion, which is insufficient to sustain a verdict.

IV.

The learned Court erred in refusing to charge the jury that the plaintiff could not recover upon their finding, that the defendants Foster and Watkins were mistaken in the value that they gave to the lots, even though they knew such value to be incorrectly stated.

This presents the square question, that from the incorrect statement of value, alone, a jury may infer fraud and the intent to deceive, and brings the case directly within the cases referred to, *supra*, under point 1. The point is even still more favorably presented for us in the refusal to charge as requested, that if the defendants Foster and Watkins were mistaken in the value they gave to the lots, and had good reason to believe such value to be incorrectly stated, still the plaintiff could not recover upon that alone.

This ruling gave the jury the right to infer from what they might deem to be good reason on the part of Foster and Watkins to know that they had incorrectly stated the value, that they fraudulently did so, and thus make fraud purely a matter of inference from a defective process of reasoning on the part of Foster and Watkins as to the situation and availibility of the property in question.

If Foster and Watkins had good reason to believe, or such reason as a jury upon review should adjudge to be good reason, it is no proof of anything, except that their judgment was defective, and certainly cannot be in a matter of opinion the basis of a charge of fraud. (See Point VI, *postea*.)

V.

In the fourth request to charge, p. 200, the learned Judge was distinctly asked to rule that the plaintiff below could not recover upon the mere finding of the jury, that the defendants Foster and Watkins were mistaken in the value they gave to the lot, even though they found that they knew such value to be incorrectly stated.

This brought up distinctly and unqualifiedly the principle for which we contend as the law of the case, that knowledge of the incorrectness of the valuation, or knowledge that an opinion of the valuation was incorrect, is not of itself sufficient to create actionable fraud. If any proposition be demonstrated from the cases which have been cited under the first point in regard to the effect of opinion, it is, according to our understanding, that the proposition enunciated in this request was correctly stated. By the refusal of the learned Judge to rule as we requested, he distinctly informed the jury, and ruled, as a question of law in the case, that a mistaken opinion as to value, and knowledge of the mistake, was sufficient to entitle the plaintiff below to recover.

I, therefore, insist that the refusal to charge the jury as requested, was error, which entitles us to a reversal of the judgment.

VI.

But the learned Judge went one step farther in his ruling, to establish the liability of the plaintiffs in error, as evidenced by the charge as made at fol. 585: "If they were not acquainted sufficiently to fairly

13 How 210. 211.

have an intelligent judgment, according to their judgment, it was false in that respect."

As we have before contended, this leaves it for the jury to infer what should be good reason to believe such value to be incorrectly stated, and, if the basis, according to the judgment of the jury, was sufficient, so that it should have been good reason to Foster and Watkins, then they were liable.

It also rules that rash and indiscreet action on the subject of the opinion of valuation is sufficient ground for holding the plaintiffs in error liable.

This is not the law of the State of New York, nor is it the law, as announced by the Supreme Court of the United States.

In *Lord vs. Godard*, *supra*, the learned Judge charged the jury, in an action for fraud and deceit, in recommending certain adventurers to be worthy of credit, that if a party states positively that a person is worthy of credit, he should do it from his own knowledge or from full and proper inquiry, and if he did it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiry, and the statement turned out to be false, the jury might infer that those so recommending it, did wrong and deceived, because they must know that third persons are likely to rely on accepting what they personally know, or had duly inquired about, or that they had good reason to suppose their information as to it was sufficient and true. If the defendants did not make the recommendation upon such authority or information as the jury thought under the circumstances they ought to have acted upon, they might charge them.

The Supreme Court of the United States held that this ruling was incorrect, and that indiscreet and wrong action, could not be made the basis of a verdict

for fraud, and reversed the judgment entered on a verdict found for the plaintiff.

They cite approvingly in the opinion the case of *Young vs. Corell*, 8th Johnson, 23.

In that case the defendant advised the plaintiff to let Davis have $5,000, and said he would do it in a minute; when, in truth, he had no reason to believe that Davis was responsible for that sum, and as the Court in the opinion says, "The advice was rash and indiscreet." A non-suit, at Circuit Court, was sustained by the Court upon appeal.

In the case of *Lord vs. Godard, supra*, it will be observed that the assertion was far more a statement of fact than in the case at bar, in which the valuation was necessarily a mere matter of opinion.

VII.

In the 16th request to charge, fol. 201, the Judge was requested to rule, that to find there was a conspiracy, the jury must be satisfied, from the evidence, that all the defendants corruptly, and with intent to cheat and defraud the plaintiff, agreed together to cheat and defraud the plaintiff by means of the certificate.

The Court, upon review, can readily see the object of the plaintiffs in error in requesting this instruction. The counsel for the defendant in error claimed, upon the trial, that the certificate was not a mere expression of an opinion as to value, because it was a part of the conspiracy to defraud; and in the honest endeavor to obtain a correct ruling for the guidance of the jury, counsel for the plaintiffs in error requested the instruction just referred to. It certainly was correct, for, eliminate the certificate from the case, there is nothing whatever upon which any pretence of responsibility on the part of Watkins and Foster can stand.

And if Watkins and Foster did not, by means of the certificate, act and conspire with Gordon to defraud the plaintiff, they did not do so at all.

The refusal of the Court to charge as requested, was therefore plain error, to the prejudice of the plaintiffs in error.

VIII.

The learned Judge also erred in charging the jury, fol. 583, "That the certificate is important in this case only as to the four lots, Hicks, Cox, Falls and Meacham."

Of course, if this question was one which arose solely upon contract, and the certificate were to be construed purely in the light of a contract, it could only take effect as to the quarry lots named in the paper itself.

But the charge is one of alleged conspiracy and fraud, and all of the circumstances attending the transaction are admissible, as throwing light upon the intent of the parties.

Clark vs. White, 12 Peters, 178.
Miller vs. Barber, 66 N. Y., 558.

The Court, in making this charge, looked too much at the case from the standpoint of the defendant in error, who singled out, of course, from the quarries named in the certificate, the ones upon which his mortgage was taken, and cared nothing about the valuations of the others. To do full justice, however, to the plaintiffs in error, we must consider their attitude as to all of the quarries named in the certificate, for they signed that certificate upon the valuations named for all the lots. The question of honesty and good faith, therefore, was as to whether they signed the certificate in good faith as a whole, although it stated the several values in their judgment, and they

were entitled to the ruling of the Court, that the whole certificate was as important, so far as their liability was concerned, as any portion of it, for they certainly did not know that Butler was to loan money on any of the quarry lots, except those named in the certificate. Or, at least, we are entitled to claim that they did not know it, so far as having the Court present the question to the jury for their determination.

IX.

The learned Judge also charged the jury, fol. 587, against our exception, "That it was not necessary to find that they intended to cheat the plaintiff, or any one, out of his money ultimately, and that, if they intended to induce some one to advance money, relying upon the property as sufficient security, although they hoped or expected it would be paid, if the security in fact failed, and the debt is not paid."

The sole theory upon which the defendant in error sought to maintain his action was that they did intend to cheat and defraud him out of his money. That purpose is entirely inconsistent and antagonistic to the hope and expectation on their part that the money would be repaid. If they did so hope and expect they could not have intended to defraud, for the matter is entirely one of intent. Within the cases cited, *supra*, no matter how injudicious or ill-advised a recommendation may be, if it be honestly made, it is not the subject of a legal allegation of fraud. The charge of the Judge, in this respect, is very much calculated to mislead the jury by giving them to understand, substantially, that the mistaken opinion of value, though accompanied by the expectation of the payment of the loan, was sufficient to authorize the defendant in error to recover.

X.

In the refusal to rule according to the 20th request, fol. 582, the court below refused to hold, "That the jury were not bound by the amount realized by the property at the foreclosure sale, but may find from the evidence that the value of the security at that time was equal to or in excess of the amount due upon the mortgage and costs of foreclosure." To appreciate the effect of this ruling, it is only necessary to consider the circumstances which had intervened between the time the certificate was signed and the loan made, and the date of the foreclosure sale in July, 1874. The commercial panic of 1873 had occurred; the sandstone enterprise had failed, and Gordon had become a bankrupt; the sale was had under all of those depressing circumstances, under proceedings to which Watkins and Foster were in no sense parties. If the property at that time bid in by defendant in error, at $1,500, was worth only that sum, and the plaintiffs in error were bound by the amount of that sale, then of course the jury were conclusively compelled to find that the property was not worth but a trifle, comparatively and presumptively, at the time of the certificate, and not much, if anything, more than the $1,500, realized in 1874.

The sale could not be, under any circumstances, more than *prima facie* evidence of the value of the property.

Campbell vs. Woodworth, 20 N. Y., 499.
Knickerbocker Life Ins. Co. vs. Nelson, 78 N. Y., 145.
Graham vs. Maitland, 1 Sweeny Superior Ct., Pr. 149.

There was no reason or justification for this ruling, and the exception taken to the refusal to find was well taken.

XI.

The 21st request to rule, and, the exception to refusal (p. 201), was error.

The learned Judge refuses to hold, that in case the jury find that the value of the security at the time of the foreclosure sale was equal to or in excess of the amount due upon the mortgage and the costs of foreclosure, then plaintiff cannot recover.

This request certainly embraces a proposition upon the subject of damages that ought to be the law of the case.

By the foreclosure proceedings, Watkins and Foster, not being parties, Gordon deeds by force of the law or compulsion through a referee to Butler, the premises in question, and Butler receives the title to the lands covered by the mortgage.

If that property was then worth the amount of this mortgage, interest and costs, then he had received no injury, and to enable him in addition thereto to obtain a verdict of nearly $12,000, against the plaintiffs in error, is to allow him to obtain property which is worth the full amount of his loan, and also to make a speculation out of the alleged fraud by having his loan restored to him substantially through the responsibility of the plaintiffs in error.

That this was the effect of the ruling of the Court, upon the request, is evident, both from the tenor of the request and from the charge of the Court, p. 203, "If you find the certificate to be wilfully false, and the lots were not worth $26,000, you may find what they were worth, and return a verdict for the plaintiff for such difference, up to and not exceeding the amount of the mortgage debt and interest, less the amount he has received," to which exception is also taken. The amount that the defendant in error

received, according to the ruling of the Court, was the difference between his bid, $1,500, and the costs of the foreclosure proceedings, or net proceeds of the sale, $957.92 (fol. 583).

These rulings of the Court, therefore, if the jury found the value of the property, at the time of the sale, to be say $15,000, which would more than cover the loan, interest, costs and damages, would allow the plaintiff, in addition to receiving $15,000 worth of property for a loan of $10,000, to recover the additional sum of $11,881.88, because of an alleged fraud committed by the defendants, and in direct contravention of the rule of law, that only just compensation should be received for injury.

The foreclosure proceedings were *res inter alios acta*, and did not in any manner affect or conclude any persons who were not parties to them.

Broom's Legal Maxims, 917 et seq.
Case vs. Reeve, 14 Johns., 79.

"The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."—*Rev. Stat. U. S., Sec. 721.*

The provisions of the statutes of the State of New York, under which foreclosure sales are had, are, with the exception of a general statute, substituting the sheriff or a referee in place of a master in chancery, as follows, viz., "All sales of mortgaged premises, under the decree of the court of chancery, shall be made by the master in chancery, in the county where the premises or some part of them are situated, unless otherwise directed in the decree of sale."

"Deeds shall thereupon be executed by such master, which shall vest in the purchaser the same estate, and no other or greater than would have vested in the mortgagee, if the equity of redemption had been

foreclosed; and such deed shall be as valid as if the same were executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, *and against all parties to the suit in which the decree for such sale was made, and against their heirs respectively and all claiming under such heirs.*

2nd N. Y. R. S., 192, Sec. 157, 158. Found in the 6th Ed. of the R. S. of N. Y., 3d Vol., pp. 198, 199.

By the technical force of the provisions of law for the foreclosure of mortgages, Gordon's debt to Butler remains undoubtedly precisely what the net proceeds of the foreclosure sale failed to pay; but the learned Judge below confounded the contract obligation of Gordon to pay, with the measure of the liability of Watkins and Foster. There is no technical rule in regard to their liability, and if the premises actually, when received by Butler, were worth his debt and all of his expenses, they are not liable for two reasons:—

First—Because it is only upon the theory that Butler obtained inadequate security for his loan that any claim of liability can be based against Foster and Watkins.

Second—Because the law, which, even in cases of fraud, awards to a party only compensation for the injury, does not give a right of action where the compensation has been already had, and where the case is one of *injuria sine damno.*

The declared object of the law is to give compensation to the party injured for the actual loss sustained, and the amount of this compensation is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of either judge or jury.

Sedgwick on Das., 28.

"For *injuria sine damno*, there is no compensation. Substantial loss to the party plaintiff must have ensued

to entitle him to substantial relief. *De minimis non curat lex.*"

Id., 32.

See also *Bartlett vs. Blaine*, 83 Ill., 25, where there was intentional fraud.
Also *Marsh vs. Cook*, 32 N. J. Eq., 262.

If Gordon had obtained a loan of $15,000, and had executed a mortgage to secure $10,000 of it, the judgment for deficiency against him would have been upwards of $14,000. Yet it could not have been claimed that Watkins and Foster were liable in any contingency for any such sum.

In arguing this question, we have the right to assume that the jury might find the value of the premises, under the evidence, to be greater than the entire amount of the mortgage, interest and costs. Upon that basis, is the object of the law accomplished, and its ends redressed to allow Butler to recover in property and money double the amount of his pecuniary injury?

The learned Judge, in his opinion upon the motion for a new trial, infers that because Watkins and Foster would have had the right to have bought the property upon the foreclosure sale, and because they had no right to require Butler to buy it, therefore, he has a right to this double compensation if he is dextrous enough to secure it. He certainly was not bound to purchase, if he saw fit to remain silent. He had the right to allow it to be sold to any one, and then could justly claim that the property had passed entirely out of his hands, and he had nothing to show for it, except the sum which it realized upon the sale. But he became a voluntary purchaser, having taken good pains to serve such a notice upon Watkins and Foster as to prevent them from purchasing unless they chose to admit their guilt.

It is error to hold that the proceedings, culminating in this sale, all of which were conducted, from the beginning to the conclusion, by the voluntary act of Butler, could conclude in any manner Watkins and

Foster, who were in no sense parties to it It is also giving an effect to a judicial sale as against third persons, such as alone could be claimed against those who were the actual parties to the proceedings.

It is also error, because it rules absolutely and conclusively that Butler had the right to liquidate and determine the amount of his damages by his own voluntary act, without the consent of those who he claimed defrauded him, and against whom he makes his charges. His acts may not conclude them and, even giving to the proceedings and sale the force of *prima facie* proof, that proof may certainly be rebutted by evidence of the actual value of the thing received by Butler.

Butler's right of action was just as perfect against the defendants in case he had not foreclosed, or attempted to foreclose his mortgage, and must be sustained by the same common law proof of the inadequacy of value. Granted, that the premises were worth $15,000, in which event, in case he had not foreclosed the mortgage, he could have recovered nothing, can he, by virtue of procuring a sale of the premises for a lesser sum, obtain a recovery to which he would otherwise not be entitled?

The Court will please remember that Watkins and Foster, not being parties to that proceeding, had no standing in court to control it, and could not in any manner move the Court for a re-sale, on account of the inadequacy of the price received. Yet, the ruling by the Court below, throws upon them a liability on account of a sale to which they were not parties, and which they could in no sense control, in favor of a party to it, who had the proceedings at all times within his grasp.

XII.

Various exceptions were taken in the trial of the action to the admission or rejection of evidence, which will now be considered.

First—At p. 42, Butler was allowed to testify to a conversation had with Gordon in the summer of 1874, and to say that Gordon told him that the certificate was got up to get money out of him.

We may concede, for the sake of argument, that so far the evidence is admissible as disclosing Gordon's own motive.

But when he undertakes to speak for Foster and Watkins, the same reason for admission does not apply. Butler is undertaking to prove by the oral declaration of Gordon, not under oath, that Watkins and Foster did know, or rather, that he supposed they knew, what the certificate was got up for.

The conversation, being objected to, was incompetent and immaterial as to Foster and Watkins, both as a mere declaration of Gordon and because incompetent as a conclusion and not a fact, even if he had so sworn instead of merely declared. Others' knowledge must be proven by acts or information conveyed to them. The motion, at fol. 134, "To strike out the last part of the answer, as being incompetent and immaterial," was improperly denied, and the exception thereto was well taken.

Second—At p. 50, under pretence of explaining a portion of a letter, Butler was allowed to testify that all he loaned from January to July, 1873, realized 11⅛ per cent. interest; that he got from Gordon only 7 per cent. interest, and supposed he got as good security; which evidence was duly objected to by the defendants as incompetent and immaterial, but the objection was overruled by the Court, and an exception taken.

I respectfully submit that this testimony was incompetent as well as immaterial; that it could have no legitimate bearing in the case, and that it was inadmissible to allow Butler to create, or attempt to create, sympathy by disclosing for what rate per cent. other loans were made by him, and his apparent loss by his loan to Gordon at a less rate.

Third—The Court erred in allowing the proof of the foreclosure proceedings, and overruling the objection at p. 53, as follows: "The said defendants severally objected to the admission in evidence of the said judgment roll as incompetent, immaterial and irrelevant, which objections were severally overruled, and to which rulings the said defendants severally excepted."

Within the purview of the precedents hereinbefore quoted, these proceedings were *res inter alios acta*. They could not bind the defendants Watkins and Foster, nor add to their liability. That liability was in law precisely the same with or without those foreclosure proceedings, and their admission introduced into the case an element which ought to have been foreign to it, but which gave a great advantage to Butler before the jury, by the claim that he had in reality obtained less than $1,000 from his mortgage, and must be a sufferer to the extent of the balance, unless they gave him a verdict.

Fourth—The same point is urged in regard to the objection at p. 53, "To the report of the referee and judgment as to deficiency as incompetent and immaterial."

And the Court will perceive that the learned Judge was somewhat inconsistent in his rulings, for he excluded the proof of the deficiency as immaterial, yet holding, at the close of the case, that that deficiency was the precise limit of the defendants' liability.

Fifth—A serious error was committed by the Court, as reported at p. 55, "Plaintiff offers in evidence two several notices to defendants Foster and Watkins, one dated April 8th, 1874, the other June 30th, 1874. The said defendants, by their respective counsel, severally objected to each of the said notices and their admission in evidence as incompetent and immaterial and irrelevant. The Court overruled each of said objections of said defendants, and admited said notices in evidence. To the rulings of the Court, and to each of the same, the said defendants, by their respective counsel, severally excepted."

It will be observed that those notices contained a recital of the claim of Butler and a statement of alleged facts, and of the fraud and deception practiced upon him by the defendants, as well as an offer to transfer the mortgage to them upon payment of a sum of money. These were the *ex parte* statements of Butler, in view of the anticipated litigation, and evidently designed as a trap. Their effect upon the jury is obvious. There was no legal obligation upon Butler to give a notice or make an offer; there was no obligation, in any aspect of the case, upon Watkins and Foster to purchase the mortgage or pay costs of the foreclosure, or to accept the offers, and the same were plainly *coram non judice*.

If Watkins and Foster acted upon the claim Butler made, by way of assent, it would, of course, be an admission of guilt. To such a paper, they only could pursue one course, namely, that which they did.

The learned Judge gives weight to this offer, as evidenced by his opinion on the motion for a new trial.

The admission of the evidence was erroneous:

1. Because no proof whatever was made of the service of the notices.

2. Because they were merely the *ex parte* statements

of Butler, which could in no manner affect the liability of Watkins and Foster, and therefore not admissible in evidence.

Sixth—The Court erred in overruling the objection which was made by the defendants to the question asked the witness Peter Post, what he gave Butler for the yearly use of the lot, and who testified that he gave $25, pp. 63–4.

The Court will bear in mind that Butler did not receive his title until after the alleged service of the offers upon Watkins and Foster, by which he indicated the intent to have litigation and the value of the premises, after the sale, in view of anticipated litigation, and especially the value of the use of the premises, was entirely immaterial. By leasing the premises to Peter Post at $25 per year, he could, of course, manufacture evidence as to the value of those premises, upon the theory that he would be disposed to lease premises at their fair value, and could not get but $25 from any one. It was entirely incompetent and inadmissible to prove at that time the value of the premises, so as to relate back to what their value was at the time of the certificate, by any such kind of evidence, and being calculated to injure, from the unfair argument that might be drawn from it, its admission was error, which should justify the reversal of the judgment.

Seventh—The Court erred in excluding the offer, p. 86, "To show that at the time of the making and delivery of said certificate the said defendant Gordon was not prosecuted for debt by legal proceedings." Of course, the alleged charge of a scheme to defraud could not stand for a moment if the parties all supposed or believed Gordon to be entirely responsible and able to pay every dollar, in any event, which could be brought against him. For if that were the case, there would be no point to the supposition that

the defendants intended to cause any loss to the plaintiff. In any aspect of the case, the solvency of Gordon, as well as the external *indicia* of that solvency, from which Watkins and Foster might be able to judge as to his condition, was material in the case. One of those *indicia* necessarily was, the fact that though doing actively a large business, he paid his debts promptly and was not prosecuted by legal process. It was, therefore, important and proper for us to prove by one who was in a position to know the fact, that he was not prosecuted by legal process, and the exclusion of such proof deprived Watkins and Foster of one of the bases of the judgment upon which they might claim good faith.

Eighth—So, too, the offer was competent, to prove the shrinkage in the valuation at Potsdam, and especially the second offer at p. 86, to prove by the witness Cox, that he had been acquainted with the value of property at Potsdam and vicinity for twenty-five years past, and that there was a large shrinkage in the value of quarry property in Potsdam between December, 1872, and July, 1874, on account of commercial revulsions generally.

It was, of course, impossible to prove the specific shrinkage in value of this precise property, because it never had any market value which might be seen, and none apart from estimates that might be put upon it. The only method of accounting for the sum for which it sold in July, 1874, as contrasted with the valuation put upon it in December, 1872, and rebutting the inference which Butler sought to draw therefrom, was by proof of depreciation of that class of property generally from causes which existed for it. We were overruled in our protest against the admission of the proof of what the property sold for in July, 1874; we knew precisely the use that would be made of this proof, and we were entitled to the largest latitude in

accounting for the cause of the inadequate price for which the property sold at that time. We offered to show that cause, as a matter of fact, that the shrinkage of quarry property in Potsdam, as a fact, depreciated the value of the property upon which Butler took his mortgage. If this testimony had been in the case, the jury might have said reasonably, though the property was worth, according to the best estimate that could be placed upon it in December, 1872, the sum at which it was appraised, yet, on account of the shrinkage of the value in quarry property at Potsdam before the sale, it sold for only the sum which was realized.

Ninth—The ruling of the Court on p. 192, overruling the objection of the defendants severally, to the letter of Gordon to Butler of August 19th, 1873, was erroneous, and the exception well taken.

That letter was written long after the loan in question was made; it did not relate to that loan; it had no connection whatever with the subject matter of this action, and was substantially simply a request for another and a different loan proffered by Gordon to Butler at that date. It was certainly incompetent and irrelevant as against Foster and Watkins, and even so as against Gordon, for it was only as against the charge of obtaining a loan of $10,000 to defraud Butler that he was called upon in this action to answer, and what he might have done under the pressure of circumstances eight months afterwards in regard to another loan, should not be held admissible to prejudice his defense or the defense of Foster and Watkins in this action.

13 How. 210. 211

XIII.

It will, therefore, be observed by the Court, upon review of this case, that serious errors have been committed as against the plaintiffs in error collectively and severally, which call for a reversal of the judgment.

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In Supreme Court of the United States.

SAMUEL B. GORDON ET AL.,
Plaintiffs in Error,

vs.

JOHN G. BUTLER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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In Supreme Court of the United States.

SAMUEL B. GORDON ET AL.,
Plaintiffs in Error,

vs.

JOHN G. BUTLER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This suit is, in effect, an action on the case for deceit brought in the court below by the defendant in error against the plaintiffs in error.

That such is the character of the action, appears from the following cases:

Skinner vs. *Gunton*, 2 Saund., 230;
Saville vs. *Roberts*, 1st Ld. Raym., 379;
Muriel vs. *Tracy*, 6 Mod., 169;
Mills vs. *Mills*, Croke's Car., 239;
Jones vs. *Baker*, 7th Cowen, 445;
Hutchins vs. *Hutchins*, 7th Hill, 104.

The defendant in error alleges that he was induced by the false and fraudulent representations of the plaintiffs in error to loan his money upon insufficient and substantially worthless securety.

The representations by which the defendant in error claims that he was defrauded were in writing, and as follows, viz:

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence County, New York, and acquainted with the sandstone quarries about three miles south of Potsdam village; that he is acquainted with the lots there owned by S. B. Gordon and situated on the westerly shore of Racket River.

"That said lots are rightly represented on the annexed diagram (a diagram annexed, here omitted), have on them the buildings, and in his best judgment contain the quantity of land, and are worth the sums severally below stated, viz.:

No. 1. Falls	lot, about		8	acres, worth	$8,000
" 2. Orchard	"	"	4	" "	$5,000
" 3. Cox	"	"	16	" "	$8,000
" 4. Hicks	"	"	15	" "	$5,000
" 5. Meacham	"	house & barn,	7	" "	$5,000
" 6. Hale	"	" " "	10	" "	$5,000
" 7. Parmiter	"		17	" "	$8,000
" 8. Train	"		26	" "	$8,000
Total 8 lots.....			103	.....	$48,000

"Dated Potsdam, 12 Dec'r, 1872.

"(Signed) "H. WATKINS.

"(Signed) "E. W. FOSTER."

The above certificate was presented to the defendant in error by one of the plaintiffs in error, the said Gordon, for the purpose of obtaining a loan upon the security of the quarries named in the certificate, or some of them.

Prior to the presentation of the certificate, Gordon had applied to Butler for a loan on the security of the

quarry property, and made representations in regard to its value, and those applications had been declined.

It is shown very conclusively that Butler refused any security that was of an uncertain value, or that he understood to be of that character. He required of Gordon that for a loan of ten thousand dollars he must give security "on real estate worth twenty thousand dollars cash, at auction." Gordon fully understood that he could not obtain a loan from Butler except by giving him security upon property which Butler believed would bring at a forced sale twice the amount of the loan.

Letter of December 3d, 1872, December 4th, 1872, Fol. 84, also Fol. 85 and Letters of Butler to Gordon and Gordon to Butler preceding and following those folios.

Gordon knew that in order to get the loan he must satisfy Butler that the security had an actual, positive market value to twice the amount of the proposed loan; that merely speculative, fluctuating values would be disregarded.

Gordon undertook to furnish evidence that would satisfy Butler.

Letters of Dec. 10th, 1872, Butler to Gordon, and Dec. 12th and Dec. 28th, 1872, Gordon to Butler, Fol. 91 *et seq.*

At this time Butler resided in the city of New York, several hundred miles from Potsdam, and had no knowledge of the quarries, as to how much or how little they had been worked, as to the quality of

the stone or its value, except what he learned from the letters of Gordon, and upon that it is plain he did not rely.

Butler knew Foster and Watkins as business men in Potsdam, likely to be acquainted with the quarries, and to know their character, quality of stone and value. He did not know, and he had no reason to suspect, that they were interested to have Gordon obtain a loan of him, or that they would deceive him or anybody else in regard to the property.

Gordon's letter, Fol. 93 *et seq.*, informed Butler very fully who Messrs. Foster and Watkins were; and the certificate of those gentlemen enclosed in that letter satisfied him as to the quarries, and induced him to make the loan; and but for that certificate he would not have made the loan. Fol. 121.

Butler had no knowledge, nor was he in any way informed, that these so-called quarries were not, in fact, quarries, but were merely undeveloped ledges. There is nothing in the certificate, and nothing in the letters of Gordon to Butler, to indicate or to lead one to suspect, but that all the quarries stood alike so far as the opportunity to judge of their value was concerned, or so far as any development showing the quality of the stone was concerned.

The statements on pages 6 and 7 of the brief for the plaintiffs in error—

1st. "That Butler knew, when Watkins and Foster signed the certificate, they could only judge by the superficial indication of an outcropping rock;" * *

2d. "He also knew from Gordon's information to

him that the cost of the quarry was far below the estimates;" * *

3d. "He was also informed that the whole of the quarries were to be turned over to a new company, which was to be formed for $40,000 of stock, which was to be sold for fifty per cent. cash;" are erroneous.

There is nothing in the evidence showing that Mr. Butler had any such knowledge or information at the time of the loan, but the contrary.

Also, other statements in the brief of the plaintiffs in error to the effect that Gordon had given Butler information which was in conflict with what was in the certificate, and which ought to have led Butler to have disregarded the certificate, are unsupported by the evidence, and are contrary thereto.

The four lots included in the mortgage to Butler had not, at the time of the certificate, or at any other time, before or since, any market value as quarries. Upon one of them, called the Ben. Cox lot, work in the way of getting out stone had been attempted at different times by various persons, always with unsuccessful results. The quantity of good stone obtained was so small, after removing a mass of worthless stone, that working that quarry was always a dead loss.

The defendant Gordon operated on this quarry with results as unprofitable as the other experimentors on the same had experienced, as shown by the testimony of his foreman Hunt on cross-examination. Fol. 265.

Of the three remaining lots mortgaged to Butler, only cordstone had been taken from the Hicks and Meacham lots, no valuable stone being found therein, and from the Falls lot no stone of any kind had been taken, and it had been only slightly uncovered, and disclosed no stone but broken and worthless ones. Fol. 196 et seq.

At the time they made the certificate Foster and Watkins had had an opportunity to know about these four lots mortgaged to Butler, the stage of their development, the amount and quality of stone taken therefrom, and whether or not these lots had any market value as quarries.

In the certificate they state how long they have been acquainted with these lots, and the number of acres of land in each respectively, and the buildings on each lot. They give details which could have been known to them only by a familiar acquaintance with the lots. They assume in thier certificate to have all the knowledge about these lots that their known opportunity would indicate they might have.

That the certificate was false in fact, and that these lots mortgaged to Butler had no value as quarries and were of very little value for any purpose, is beyond controversy, and on the trial in the court below was not seriously controverted.

The question whether or not the certificate was fraudulent on the part of Foster and Watkins was a question that had to be determined largely on circumstantial evidence, as all such questions generally must be. It was a question peculiarly within the

province of the jury to determine under proper instructions from the court. It necessarily involved a weighing and consideration of the great mass of evidence in the case.

The fact that the lots mortgaged to Butler were worthless as quarries at the time the certificate was made, and the fact that Foster and Watkins failed on the trial to make any satisfactory explanation how they, knowing what they did about the lots, could have honestly made the certificate, would be some of the circumstances for the jury to consider on that question.

Also, the fact that Foster and Watkins, both before and after the making of the certificate, made statements inconsistent with their affirmations in the certificate.

Also, the fact that Foster and Watkins had a motive to aid Gordon to get a loan of Butler in order to enable them to meet their impending liabilities as indorsers of the firm of Hitchins & Brown by borrowing money of Gordon.

The firm of Hitchins & Brown failed just before the making of the certificate, and among other liabilities was a note for ten thousand dollars, payable in gold, on which Foster and Watkins were indorsers, and which they then understood they had got to pay, and one-half of which would soon afterwards come due.

Foster & Watkins took their stock in the Sandstone Company at the same time that they signed the certificate, having previously declined to take

such stock. The two transactions were concluded by the same negotiation.

Shortly after Gordon got his loan of Butler, Foster & Watkins borrowed four thousand dollars of the same, and used it in paying the note payable in gold.

Hitchins & Brown failed December 4th, 1872. The certificate bears date December 12th, 1872, and was signed by Foster & Watkins December 18th, 1872, at the same time Foster & Watkins signed the agreement to take stock in the Sandstone Company, and was used by Gordon to obtain the loan of Butler in season to be loaned by Gordon to Foster & Watkins for paying the note payable in gold.

See testimony of Foster & Watkins, Fol. 286 to Fol. 340, and dep. of Gordon, Fol. 496 to Fol. 500.

There could be no doubt but that the certificate was made for the purpose of raising money on the credit of the property recommended by it, nor but that Butler relied upon it in making the loan; and the question whether or not the certificate was fraudulently made was submitted with the other questions in the case to the jury with very careful instructions by the Court.

Argument.

I.

We submit that the evidence in this case was properly given to the jury for their consideration upon the following questions:

1st. Were the representations of the plaintiffs in error false?

2d. Were those representations fraudulent?

3d. Was the defendant in error thereby injured?

We further submit that the jury, with proper instructions by the court, having returned a verdict, the same ought not to be disturbed.

II.

The representations in controversy were made in writing by two of the plaintiffs in error (Foster and Watkins), and used by the third (Gordon) to obtain from the defendant in error a loan of money upon the security of the property to which the representations related.

At the time of the negotiation for the loan the defendant in error was entirely unacquainted with the property proposed as security for the loan, and by reason of the great distance of his residence therefrom, had no opportunity of inspecting the same, and no means of forming his own judgment as to the character, quality and value of the proposed security. Under such circumstances no rule analogous to the rule of caveat emptor between buyer and seller could have any application. There is also this further fact that would preclude the application of any such rule: the plaintiffs in error, Foster & Watkins, who made and subscribed the written representations, did not present themselves to the defendant in error as seeking to obtain a loan for themselves, but they presented themselves to him as disinterested third persons, well acquainted with the property upon which the other plaintiff in error (Gordon) was seeking to obtain the

loan ostensibly for himself alone. It must be presumed the plaintiffs in error intended that the defendant in error should rely upon those representations, and that the defendant in error had the right to rely on such representations, and if they turned out to be wilfully false, to hold the plaintiffs in error responsible therefor.

Addison on Torts, p. 1022;
Simar vs. *Canaday*, 53 N. Y., 298;
Miller vs. *Barber*, 66 N. Y., 558;
Smith vs. *Countrymen*, 30 N. Y., 683;
Mead vs. *Bunn*, 32 N. Y., 275;
Van Epps vs. *Harrison*, 5 Hill., 63;
Sandford vs. *Handy*, 23 Wend., 260;
Culver vs. *Avery*, 7 Wend., 381;
Medbury vs. *Watson*, 6 Met., 246;
Page vs. *Bent*, 2 Met., 374;
Irving vs. *Thomas* 18 Me., 418;
Savage vs. *Stevens*, 126 Mass., 207;
Teague vs. *Irwin*, 127 Mass., 217;
Paddock vs. *Fletcher*, 42 Vt., 389;
Adams vs. *Soule*, 33 Vt., 538;
Somers vs. *Richards*, 46 Vt., 170;
Coon vs. *Atwell*, 46 N. H., 510;
Smith vs. *Richards*, 13 Pet., 280;
Sherwood vs. *Salmon*, 5 Day, 439;
Fulton vs. *Roosevelt*, 5 Johns. Ch., 174;
McLellan vs. *Scott*, 24 Wis., 81.

The written representation of the plaintiffs in error, Foster & Watkins, was in substance that they had resided in Potsdam for more than twenty years,

and were acquainted with the sandstone quarries of the other defendant in error, Gordon, about three miles distant, and that in their best judgment those quarries were worth the sums named in their certificate. This is an affirmation of acquaintanceship or knowledge of the quarries for more than twenty years, as quarries or places in the earth from which stone had been taken, and also an affirmation of their best judgment after such acquaintanceship as to the value of those quarries. This is an affirmation of the credit to which, in their best judgment, after more than twenty years acquaintance, the property in question was entitled, presented to the man of whom a loan was sought upon the security of the same property. Any such general affirmation fraudulently made, in respect to property that was worthless, would entitle the person decieved thereby to recover damages; therefor, to the extent of the injury received.

Williams vs. *Wood*, 14 Wend., 126;
Allen vs. *Addington*, 7 Wend., 9.

If this affirmation was false and fraudulently made, or if the plaintiffs in error made this affirmation knowing it was false, or having good reason to believe it was false, and the defendant in error was thereby deceived, then the plaintiffs in error are liable to the defendant in error for the damages thus occasioned to him.

Again, the plaintiffs in error by this affirmation assumed to have an acquaintanceship with the property in question upon which they could base an intelligent judgment, and it is manifest that they intended by

their affirmation to convey the impression that they had knowledge upon which an intelligent judgment could be founded, and that according to that judgment the property was worth the sums named in the certificate. Now, if the plaintiffs in error knew or believed that they had no such knowledge and no such judgment, then their affirmation was false and frandulent, and they are liable to the defendant in error so far as he relied upon it to his injury.

Bennett vs. *Judson*, 21 N. Y., 238;
Hubbard vs. *Briggs*, 31 N. Y., 518;
Marsh vs. *Falker*, (1st Hand,) 40 N. Y., 562;
Craig vs. *Ward*, 3 Keyes (N. Y.), 387;
Meyer vs. *Amidon*, 45 N. Y., 169;
Oberlander vs. *Spiess*, 45 N. Y., 175;
Hubbell vs. *Meigs*, 50 N. Y., 480;
Wakeman vs. *Dalley*, 51 N. Y., 27;
Harling vs. *Randall*, 15 Me., 332;
Stone vs. *Denny*, 4 Met., 151;
Fisher vs. *Mellen*, 103 Mass., 503;
Litchfield vs. *Hutchinson*, 117 Mass., 195;
Cabot vs. *Christie*, 42 Vt., 121;
Stowe vs. *Covill*, 29 Mich, 359.

The books are full of cases where actions have been maintained for false recommendations of the credit of traders by persons thereby deceived. The present case is analogous to those cases and must rest upon the same legal principles. Those cases and the present case both rest upon the ground that fraud accompanied by damage furnishes a good cause of action.

Paisley vs. *Freeman*, 3d T. R., 51;
Upton vs. *Vail*, 6th John's, 181;
Lord vs. *Colley*, 6 N. H., 99;
Zabriskie vs. *Smith*, 13 N. Y., 22;
Patten vs. *Gurney*, 17 Mass., 182;
Haycroft vs. *Creasey*, 2 East, 91;
Ewins vs. *Calhoun*, 7th Vt., 79;
Weeks vs. *Burton*, 7th Vt., 67.

III.

The plaintiffs in error have alleged various exceptions taken to the rulings and charge of the Justice who presided at the trial of this cause by jury in the court below as the grounds for the reversal here of the judgment there rendered. A motion for a new trial, based on the same exceptions, was made in the court below by two of the plaintiffs in error (the said Foster & Watkins), and after a full hearing that court rendered an opinion.

Record, pp. 206–7–8–9.

Inasmuch as this opinion of the court below covers substantially the entire ground upon which these exceptions rest, and shows very definitely and distinctly that the same are not well taken, we annex it hereto and ask that it be considered as a part of this Brief.

United States Circuit Court, Northern District of New York, June term, 1878.

JOHN G. BUTLER,
vs.
EDWARD W. FOSTER, HENRY WATKINS, SAMUEL B. GORDON.

This cause has been heard on the motion of the defendants Foster and Watkins for a new trial, after verdict for the plaintiff at June term, 1877.

The action appears, in scope and effect, to be the same as a common law action on the case for deceit. The ground on which such an action might rest was well stated by Croke, J., in *Bailey* vs. *Merrill*, 3 Bulstr. 95, to be that fraud without damage or damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth. (2 Kent Com., 489; Addison on Torts, § 1174; *White* vs. *Merritt*, 7 N. Y., 352). By fraud here is meant an intention to deceive, from whatever motive arising. (Le Blanc, J., in *Haycraft* vs. *Creasy*, 2 Edst., 108, 2 Kent, 489n). These principles have been very frequently applied in actions for giving false credit to traders. (*Pasley* vs. *Freeman*, 3 T. R., 51; *Eyre* vs. *Dunsford*, 1 East., 318; *Vernon* vs. *Keys*, 12 East., 632; *Tryon* vs. *Whitmarsh*, 1 Met., 1; *Ward* vs. *Center*, 3 Johns., 271.) This action is very much like those of that sort. There the gist of the action is the fraudulent representation by the defendant that a person is entitled to credit; here the foundation of the complaint is that the defendants fraudulently represented that certain property was entitled to credit. The grounds on which they are maintainable are the same, namely, fraud in the defendants, and resulting damage to the plaintiffs. Kent. Ch. J., in *Upton* vs. *Vail*, said of *Pasley* vs. *Freeman*: "The case went, not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or

deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." Whether this action can be maintained depends upon whether the fraud of the defendants in the sense of the law, and damage therefrom to the plaintiff is made out.

The representation by these defendants was in writing signed by them, that they had resided in the town in and adjoining which the property was situated and been acquainted with it for more than twenty years, and in their best judgment it was worth the sums named. There was no question but that it was made with the intention that it should be used to induce whomsoever it might be presented to to advance money on faith in the value of the property; nor but that it was presented to the plaintiff and he did advance money.

If it was false and known by the defendants to be false, the deceit is made out.

The jury have found either that they were not well enough acquainted to have a judgment in regard to the property in respect to its value, or that the judgment they gave was not their best judgment. And not only this, but they had the benefit of their own judgment as to whether their acquaintance was sufficient to enable them to judge of the value of the property; so that the jury must not only have found that they were not sufficiently acquainted to form an intelligent judgment if the representation was found to be false in that particular, but that they knew that they were not.

The force of the representation lay in the fact that it set forth what purported to be the judgment of men long acquainted with the property. The fact of acquaintance was an important part of it.

Judgment without acquaintance would be no more reliable than acquaintance without judgment.

The jury were so required to find, and in express terms required to find that it was wilfully false, in order to find as they did for the plaintiff. In Addison on Torts, § 1175, it is laid down that "In order to maintain an action for deceit, or for false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a fraud. Whether the defendant has any interest in the assertion he makes or in the matter respecting which it is made is perfectly immaterial." "The general rule appears to be that if any man makes a fraudulent representation for another to act upon, either directly or indirectly, and such representation is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages."

Upon the finding of the jury the actionable fraud on the part of the defendants is made out.

The jury have also found that the plaintiff, without any lack of common care and diligence on his part, advanced money on faith of the representation on the property as security, which has almost wholly failed.

According to the principles laid down in the books and cases cited, these findings, if reached on proper evidence, entitle the plaintiff to recover for some amount.

If entitled to recover at all, he is, on common principles, entitled to recover compensation to the extent of the injury for which he recovers. This is not questioned much, if any, but it is claimed that the jury have or may have found more than this.

He advanced his money on the mortgage. By the laws of the State, according to the statements of counsel on each side, he could not bring ejectment and recover possession of the property, but could only proceed to a sale of it. This he did, and the defendants have received the benefit of what it sold for. They were expressly notified of the sale and of his claims in respect to the property and their liability, and had the same right and opportunity to purchase that he had. He bought the property at the sale. Now if he acquired the property by his mortgage, he lost the money and got the property, and could only recover the difference between the money and the value of the property. But he did not so acquire it. He acquired the property at the foreclosure sale by his purchase made then and there, and got by his mortgage only what it brought. Before the sale he had no right to the property, except to have it sold, and have the avails applied on his mortgage. They had no right in respect to it except to have the avails so applied in the discharge of their liability to him. They had no right to require him to buy it. The avails of the sale have been applied according to their right. If he has made anything by the purchase, and whether he has or not has not appeared, it is the result of his own skill and pains, and appears justly to belong to him.

The cases cited in behalf of the defendants upon the main question in this case are mostly by buyers against sellers, upon representations made on the sales, and although well considered and sound, are not applicable here, except in a general way. The plaintiff was not a purchaser until he purchased at the foreclosure sale, and the defendants have not been sellers at all.

From the considerations already stated, it appears that the requests of the defendants to have the jury charged were complied with so far as the defendants were entitled.

There is no doubt but that they were entitled to have the

law stated correctly to the jury, so far as their rights were involved, upon all aspects of the case which their evidence tended to establish, but it is not understood that it was their right to have the instruction given in any particular form of words or in any set terms.

Without going through with the requests in detail, it is deemed sufficient, for all present purposes, to mention that the jury were carefully instructed and cautioned all the way not to find a verdict for the plaintiff unless he had established, by the requisite measure of proof, the wilful falsity of the representation, the intention to induce the advancement of money by it, the inducement of the plaintiff by it to advance his funds without fault, and the failure of the security.

If these things constitute a cause of action, as it is considered they do, they were protected, so far as the court could protect them, against being found liable without proof of the necessary facts. The existence of the fraudulent intent, in such cases, is peculiarly within the province of the jury. (*Ward* vs. *Center*, 3 Johns., 271.) It is claimed, however, that in coming to these findings, the jury had improper evidence before them, on the part of the plaintiff, and proper evidence excluded from them, on the part of the defendants. If this is true, a new trial should of course be granted.

The first question of this sort is upon the admission of the plaintiff's explanation of his meaning of words or phrases in a letter to Gordon, as appears at folios 149, 158. It is true that the reliance of the plaintiff upon the representations of the defendants was material, and that the letter bore upon that subject in favor of the defendants. But it was written long after the representations were made and he had acted upon them, and was not anything the defendants had acted upon. It was not conclusive evidence of any fact between the parties. As it stood, it tended to

show what was in his mind when he wrote it. The defendants were entitled to have it in, but that could not deprive him of the right to meet it, if he could, by explanation, or contradiction even. There was no estoppel by it. What was open for them to prove was open to him to meet, and he only had in this respect the privilege of meeting their proof. The next is as to the admission of the notices of the sale, as shown at folios 215 and 174 Record.

The principal objection now urged is that they contain recitals of facts, but they were not admitted subject to any specific objection of that sort, nor as evidence of any fact recited. They were admitted as a transaction between the parties relating to the subject of the suit. It was no more than fair, in view of the plaintiff's claim, that he should give the defendants notice of the claim he made before the sale, that they might attend and see that the property brought its full value to save themselves, if they should wish. It is said that they were not parties to the proceedings under which the sale was to be made—which is true. The purpose of the notices appears to be to make them parties, so far as they should have any interest in the result of the sale. This appears to have been proper, and does not appear as if it has or could improperly affect the rights of the defendants in any way.

The exclusion of the testimony as to Gordon not being prosecuted for debt is urged as an error. If the representation had been as to his pecuniary responsibility, probably this proof would have been admissible upon the question of the good or bad faith of the defendants, but it was not, it was merely as to the property. There was no issue in the case upon which this question could have any proper bearing.

The same is urged as to the exclusion of evidence concerning the shrinkage of values of property, and especially quarry property in the town where this property was situ-

ated, on account of commercial revulsions generally. The effect of commercial revulsions generally would probably be generally known and not the subject of specific proof, but if not, this offer was not confined to the property in controversy. It covered all the property in the town, at first, and then was left to cover all the property of that kind in town. Such offer acceded to would open an inquiry much too wide. If evidence as to the value of other property was received on one side it would have to be, if offered, on the other. No evidence as te the value of this property was excluded and that would seem to be as far as the parties were entitled to go. The exception to the admission of the letters as amended is not so broad as the defendants' counsel seem to have supposed. Those admitted subject to objection were admitted with reference to a particular interrogatory specified in the deposition of Gordon by number. In the case as settled, the interrogatories in the deposition are not numbered. So the want of connection, if any, is not apparent.

The witness Train had not testified about the specimen from the Parmeter quarry in chief, and so it was not a legitimate subject of cross-examination.

After a careful review of all the points urged on this motion it does not appear but that the defendants had as fair a trial as the court could give them. If there were errors they are not now seen, and there seems to be no way but to leave the questions to the review of the higher tribunal to which the defendants are entitled.

The motion for a new trial is overruled and judgment ordered to be entered on the verdict.

HOYT H. WHEELER.

IV.

The class of cases cited by the plaintiffs in error in their brief brought by the buyer against the seller, where the rule of *caveat emptor* was held to apply, cannot have any application here for several reasons. Those cases differ from the present case in respect to the character of the representations made, and the circumstances under which they were made. In those cases the representations were made on occasions where property was sold, as to the character, quality and value of the thing sold. Here the representations are a recommendation of the credit to which certain property is entitled as security for a loan.

In those cases the representations were made by the seller to the buyer in respect to property open to the examination of both parties alike. Here the representations were not made by the person offering the property on the credit of which the loan was sought, but ostensibly by disinterested third persons, and where the property was not open to the examination of both parties alike.

In those cases the representations made were a part of the chafferings and banterings that ordinarily precede a sale between the parties thereto. Here the representations made were solemn affirmations deliberately put in writing, ostensibly by disinterested third persons, recommending that certain property upon which a loan was sought was entitled to credit.

Holbrook vs. *Connor*, 60 Me.; *Parker* vs. *Moulton*, 114 Mass., and *Ellis* vs. *Andrews*, 56 N. Y., cases specifically cited and commented upon in the brief for

the plaintiffs in error, are cases that simply illustrate the latitude of expression which the law allows to a vendor when making a sale, and when the rule of *caveat emptor* applies. This latitude of expression allowed to the vendor, within which the rule of *caveat emptor* applies, is, however, circumscribed by the law within very narrow limits.

In the case cited from Mass., *Parker* vs. *Moulton*, where there was a demurrer to the plaintiff's declaration, it was held that if the declaration had contained the further allegation that the representations set forth caused the plaintiff to forbear inquiries which he would otherwise have made, then the declaration would have stated a good cause of action.

The law, while it tolerates the freedom of expression necessary for the transaction of business between buyer and seller, does not protect the perpetrator of downright fraud from being amenable for the consequences of his wrong doing,

The buyer has a right to rely upon, and the seller is responsible for statements in regard to matters within the knowledge of the seller, and not open to the examination of the buyer; or if the seller makes statements which cause the buyer to forbear inquiry, he then becomes responsible if those statements are false and fraudulent.

In *Meade* vs. *Byron*, 32 N. Y., before cited, 275–280, touching this subject, the Court use the following language:

"Every contracting party has an absolute right to rely upon the express statement of an existing fact, the truth of

which is known to the opposite party and unknown to him as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract with full means of knowledge, has deliberately pledged his faith."

The case of *Ellis* vs. *Andrews*, particularly cited by the plaintiffs in error, inasmuch as it was decided by a divided court, probably goes to the outside boundary within which the rule of caveat emptor is circumscribed. That case holds that it was the folly of the buyer to rely upon the statement of value merely by the seller (unaccompanied by any particulars or other statement whatever), and that he ought to judge for himself in that matter. It is not held that the case of *Ellis* vs. *Andrews* really conflicts with the case of *Simar* vs. *Canaday*, 53 N. Y., 298–306, before cited.

See notes of the reporter to *Ellis* vs. *Andrews*, 56 N. Y., 83.

In the case of *Simar* vs. *Canaday*, it was held that statements of the value of land by the seller to the purchaser, do furnish a good cause of action for the injury thereby occasioned, "where they are fraudulently made of particulars in relation to the estate of which the vendee has not equal means of knowledge, and where he is induced to forbear inquiries which he would otherwise have made."

The cases of *Ellis* vs. *Andrews* and *Simar* vs. *Canaday*, decided by the same court, and with very little time intervening between them, construed together re-affirm the law settled in *Paisley* vs. *Freeman*, 3 T. R., 51, viz: that fraud coupled with damage furnishes good ground of action.

We submit that upon these authorities statements such as are contained in the certificate in this case made by the vendor to the vendee, would make the vendor liable for the damage thereby occasioned if they were fraudulently made in respect to particulars of which the vendee had not equal means of knowledge, and if the vendee was thereby induced to forbear inquiries which he would otherwise have made.

Again, false and fraudulent statements which, if made by vendor to vendee would not be actionable, have been held to make a third person liable for making them to the vendee for the damage thereby occasioned, and if the vendor was in collusion with such third person, then both would be jointly liable.

Medbury vs. *Watson*, 6 Met., 246;
Adams vs. *Soule*, 33 Vt., 538—

before cited, fully sustain the last position.

It is plain that our case stands well enough tested by the law that specially regulates vendors and vendees.

But this action is for falsely and fraudulently recommending certain property as entitled to credit, and the language used in the certificate is appropriate to a recommendation of credit to a particular property or a particular person, and used in that way it has a much stronger force and effect than the same language would have when used by a seller to a purchaser while negotiating a sale.

V.

Upon the question whether the representations in this case were fraudulent or not, the plaintiffs in error

have cited certain cases which are entirely in accordance with the instructions to the jury of the court below upon that subject.

In *Marsh* vs. *Faulkner*, 40 N. Y., cited by plaintiffs in error, it was held that the defendant would be liable if he knew the representations to be false, and intended by them to deceive, or if he assumed to have knowledge of their truth, knowing that he had no such knowledge.

In the case of *Wakeman* vs. *Dalley*, also cited by the plaintiffs in error, it was held that the defendant would be liable if he believed, or had reason to believe at the time he made the representations, that they were false, or if, without knowledge, he assumed or intended to convey the impression that he had actual knowledge of their truth.

These cases and the other cases cited by the plaintiffs in error on this point are entirely consonant with and support the charge to the jury by the court below, and are not in conflict with it in any particular.

VI.

In respect to the requests of the plaintiffs in error to the court below, we submit that the court, either in terms or in substance, charged the jury in accordance therewith, so far as the law would authorize it so to do, and that the plaintiffs in error have no good cause of complaint on that account.

We also submit that none of the exceptions of the plaintiffs in error to the charge of the court are well taken.

Exception was taken to the ruling of the court below as to the manner in which Butler should account for what he received by the foreclosure of his mortgage. The court ruled that he must account for what he received by the foreclosure sale.

The plaintiffs in error concede that it would be so if anybody besides Butler had bought the property at the foreclosure sale; but they claim, inasmuch as the property was struck off to Butler—he bidding higher for it than anybody else would—that a different rule applies, and that Butler, instead of accounting for what the property brought at the foreclosure sale, must account for what the jury might find the property was actually worth at the time of the foreclosure sale.

In the first place, as Butler, according to the law of New York as it is agreed on both sides to be, had the right in common with all the rest of the public to bid at the foreclosure sale, it is impossible to see how it could make any difference with the law as to the application of the proceeds of the foreclosure sale, whether Butler bid it off or anybody else. The cause of action which the defendant in error alleged against the plaintiffs in error, was that their fraud induced him to loan his money on the mortgage, and that allegation must have been established before the question of damages could have been reached at all.

The plaintiffs in error were liable to make full compensation for the injury done by their fraud. Foster and Watkins were bound by the foreclosure sale so far as this suit is concerned, in precisely the same

manner that Gordon was. They are bound to indemnify Butler for the fraud jointly with Gordon. Butler's injury was the amount of money fraudulently obtained from him in excess of what he realized by the foreclosure sale.

By the law of New York, as agreed by both parties, he could realize nothing on his mortgage except by a sale of it. He could take nothing to apply on his debt but the proceeds of the sale of the mortgaged property. If he himself became a purchaser he took, as a purchaser, at the foreclosure sale, with the liability of paying the purchase price, and with no contingency of payiug more or less than the purchase price in case the property, in fact, was worth more or less than the purchase price.

The fact that Foster and Watkins were notified of the sale and of the claim that Butler made against them, does away with any possible charge of unfairness. Their excuse that they did not attend the sale because such attendance would show guilt, seems very thin.

They had solemnly appraised this property at the sum of $26,000.00, and yet they would not attend an auction sale of it, where it was sold for a merely nominal sum, and bid upon it, because to do so would show that, in appraising it at the sum of $26,000.00, they appraised it for more than they thought it was worth.

But while this exception seems to us to be utterly groundless, there is another consideration which bears on the matter. The ruling made by the court was

really more favorable to the plaintiffs in error than the ruling which they now claim the court should have made, would have been.

The defendant in error would have been entirely content that the plaintiffs in error should have had the ruling in this matter which they now claim. A careful weighing of the evidence in this case would establish the fact, by a large preponderance of proof, that Butler paid more for this property than it was worth.

In regard to the exception on page 42 to the evidence, as to conversation between Butler and Gordon, it was only admitted as evidence against Gordon, and to that extent there can be no doubt of its admissibility.

As to the objection on page 50 to Butler's explanation, it was allowed to explain Butler's letter of September 5, 1873, on page 44, introduced in evidence by the plaintiffs in error, and written long after the transactions out of which this suit arose.

The exception—page 53—to the foreclosure proceedings, so far as they were admitted, is groundless; their admission was proper, as it was material to show what had been done on the mortgage, and what had been realized from the property.

The admission of the notice served on Foster and Watkins was proper, as showing the transactions between the parties touching the subject-matter of the suit, page 55.

These notices were introduced as evidence simply that Butler gave Watkins and Foster such a notice,

and not as evidence of any fact therein contained. No specific objection was made to any recitals therein contained, and no objection was made to the proof of service, or to any want of proof of service thereof, the proof of service was received without objection.

As to the objection to the question put to the witness Peter Post—pages 63–4—and his answer thereto, while the evidence might very properly be admitted as evidence bearing upon the question of the value, it was admitted on another ground.

On the re-examination of this witness by the defendant in error, by whom he was introduced, this question, was allowed to explain and rebut any implication that might be made from the matter drawn from the witness by the plaintiffs in error on cross-examination, to the effect that he had charge of the lots bought by Butler at the foreclosure sale, and that he rented them under Butler.

The offer to show that Gordon, at the time when the certificate was made, was not prosecuted for debt by legal proceedings, p. 86, was properly excluded as immaterial. There was no question in the case on which that fact would have any bearing.

The offer to show shrinkage of property at Potsdam generally, and of quarry property generally by reason of general commercial revulsions, p. 86, was very properly rejected by the court, in its discretion, as unreasonably opening a wide field for evidence on one side, and the other upon immaterial issues. The plaintiffs in error were allowed to introduce all the evidence they offered bearing on the shrinkage in value of this particular property.

The exception to the letter of August 19, 1873, Gordon to Butler, and the answer thereto, p. 192, is not well taken.

Those letters were part of the negotiation between Gordon and Butler for a loan of $5,000.00, obtained from Butler by Gordon the forepart of September, 1873, and testified to by Gordon in his deposition. Folio 358. After the deposition of Gordon had been offered and read in evidence by the plaintiffs in error, the defendant in error offered the letter of August 19, 1873, and the answer thereto in reference to Gordon's testimony in respect to such loan, and the same was received on that ground.

HARRY BINGHAM,
Counsel for Defendant in Error.
A. X. PARKER,
Of Counsel for Defendant in Error.

p 21 - Certificate

15-559 le

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 813. 237

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY, APPELLANT,

vs.

THE BOARD OF TRUSTEES OF THE TOWN OF CATLETTSBURG, KENTUCKY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED 3d SEPTEMBER, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 813.

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1 Proceedings of the Circuit Court of the United States for the district of Kentucky at the regular term, begun and held at the Federal Court hall, in the city of Covington, on Monday, the 2d day of December, A. D. 1878.

Present: Honorable John Baxter, judge of the United States for the sixth circuit and the district of Kentucky.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY
vs.
BOARD OF TRUSTEES OF THE TOWN OF CATLETTSBURG, KENTUCKY. } 856.

Be it remembered that heretofore, to wit, on the 11th day of May, A. D. 1877, came the complainants by their counsel, Berry & Hounshell, and filed in the clerk's office of our said court its bill in chancery against the above-named defendants, which said bill is in the words and figures following, to wit:

Bill.

To the honorable the judges of the Circuit Court of the United States for the sixth circuit and district of Kentucky, in chancery sitting:

Your orators, "The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company," a corporation of the State of Ohio,
2 and a citizen of that State, having its principal office at the city of Cincinnati, bring this their suit in equity against the Board of Trustees of the town of Catlettsburg, a corporation of the State of Kentucky, having its principal office at said town and within the said district of Kentucky.

And your orators show to your honors that they now are and for many years have been the owners of a large number of steamboats of over one hundred tons burthen, engaged in the navigation of the Ohio River, carrying on commerce upon the navigable waters of said river between the States bordering thereon, and between the ports of Cincinnati, Catlettsburg, and Pomeroy, situate thereon.

That all of their said vessels, during all the time they were so engaged, were regularly licensed by the United States to carry on the coasting trade. That in the course of said navigation the said steamboats of your orators made frequent landings at the *public wharf* of said town of Catlettsburg, to receive and discharge freight and passengers, and for other necessary and lawful purposes; and upon each of said landings were subjected to an illegal tax propor-
3 tioned to the tonnage of each of said boats, amounting in the aggregate from January 1st, 1870, to April 30th, 1877, upon all of said boats to the sum of five thousand and ninety-two dollars, the particulars of which will more fully and at large appear in the

Exhibit marked "A," hereto attached and made part of this bill. That the said tonnage duties were levied by the defendants and collected under their orders by their servants and officers solely under the following pretended warrant or authority; that is to say, by section 31 of the charter of the town of Catlettsburg, approved by the General Assembly of Kentucky January 28th, 1868, authorizing the Board of Trustees of said town "to erect, make, and repair wharfs and docks, and to regulate and fix the rate of wharfage thereat; to regulate the stationing or anchoring of vessels or boats or rafts within the town limits and the depositing freight or lumber on the public wharves." And also by an ordinance approved and adopted by the Board of Trustees of Catlettsburg February 23, 1871, in the following words: The following rates are established as charges upon steamboats and other water crafts landing at the public landing of Catlettsburg, Kentucky: On transient steamboats, one dollar for every landing; on the largest sized regular packets, over one hundred tons custom-house measure, one dollar for each landing, and on all steamboats under one hundred tons burthen, fifty cents for each landing; for all store-boats or trading-boats, one dollar for each landing, and if they remain more than one day, fifty cents per day for each day they remain; and for each wharf boat used for the purpose of wharfage and commission, ten dollars per month;" and also by a certain other ordinance passed by the Board of Trustees of the town of Catlettsburg on the 5th day of May, 1873, in these words: "That the public landing on the Ohio River between Division and Main streets is hereby appointed and established as a steamboat landing, and all steamboats arriving at the town of Catlettsburg shall land at the wharf situate as aforesaid between Division street and Main street, and at no other point within the corporate limits of the town of Catlettsburg, except by the written consent of the wharf-master of said town; that for any violation of the foregoing section, the owners, controllers, or masters of any boat so violating shall be jointly and severally liable to pay a fine of ten dollars for each offense, which may be recovered by warrant in the name of the Commonwealth of Kentucky for the use of the Board of Trustees of the town of Catlettsburg. "It is hereby made the duty of the wharf-master to enforce this ordinance, and to report and prosecute all violators thereof." That your orators are advised by counsel and so allege that the said tonnage tax or duty so imposed is a regulation of commerce and a duty of tonnage, and as such is unconstitutional and void, and contrary to section 10 of the first article of the Constitution of the United States.

Your orators further say that the said defendants, under the above ordinances, claim the right to sue for and collect from your orators and the masters commanding each of your orators' said boats the sum of ten dollars for each refusal to pay said tonnage duties fixed by said ordinances, thereby subjecting your orators to a multiplicity of suits and vexatious litigation upon their refusal to pay said illegal tonnage

duties. That under the said charter of the town of Catletts-
6 burg, it is the duty of the officers of the defendants to make and keep monthly accounts of the collections on account of wharfage at the port of Catlettsburg; and that the defendants have in their said monthly accounts the full amount of wharfage so collected under their said ordinances from your orators. That the said defendants, unless restrained and enjoined from so doing, will harass and vex your orators with multiplied suits for their refusals longer to pay said wharfage exactions, to the great injury and annoyance of your orators.

Your orators further state that the said taxes so imposed by the said defendants were excessive and much beyond all reasonable charges for the use of said wharf by your orators' boats, and tend in a great degree to obstruct the navigation of said river. That, in fact, the amount already collected for the use of said wharf, as aforesaid, greatly exceeds the cost of erection and continuance of the same. And the wharf-master of the defendants at the said port of Catlettsburg charged, exacted, and collected the said taxes from your orators' boats while landing at the private wharf-boat and landing of Brown & Useil, within the corporate limits of the town of Catletts-
burg, duly authorized to collect the same rates of wharfage
7 as the defendants by an act of the General Assembly of Kentucky, passed the 15th day of March, 1871. Wherefore your orators pray that the said defendants, the Board of Trustees of the town of Catlettsburg, be made parties defendant to this bill. That they be required to answer upon oath fully its allegations and charges, and to disclose fully the amount collected by them from your orators. That this cause be referred to the master to take and state an account of said collections so made by the defendants, and that the said defendants be restrained and enjoined, pending this suit, from any further collections of tonnage duties under said ordinances, and also from the institution of any suits, pending this cause, against your orators' said boats for their refusal to pay said tonnage duties as wharfage rates, until the further orders of this court. And that upon a final hearing your honors will decree a final injunction against the said defendants, and their agents and officers, prohibiting them from the collection of said tonnage duties.

Your orators further state that they are wholly unable to make proof of the various items of charge so imposed upon their said
boats by the said defendants, owing to the great multitude of
8 instances in which such charges have been made and paid; and they therefore pray that the defendants may be ordered to make discovery thereof, and to account for the same, they having kept, as hereinbefore alleged, a regular and full account of the same.

And your orators further state that they are obliged to seek the protection and interference of this court, and to invoke its jurisdiction in their behalf, for the reason that the claim of the defendants to levy said illegal exactions is a continuing claim, and will be exercised by the defendants to the great and irreparable injury of your

orators in the navigation of the Ohio River by their said boats unless the said defendants are prohibited therefrom by the restraining orders of this court, and that your orators' remedy at law would be wholly inadequate and lead to a great multiplicity of suits to be brought by them for the repeated exactions of said illegal tax.

Your orators pray for a decree for whatever amount may be found by said account to be due them, and for all general relief. May it please your Honors to award the United States gracious writ of subpœna prayed for against the defendants, the Board of Trustees of
9 the town of Catlettsburg; and as in duty bound they will ever pray.

BERRY & HOUNSHELL,
Counsel for the C., P., B. S. & P. P. Co.

The following is the exhibit referred to in the foregoing bill as Exhibit "A," and is as follows, to wit:

Exhibit "A."

Str. Fleetwood.

Jany. 1, 1870, to March 31, 1873, 270 trips, @ $2.00	$540 00		
Mch. 20, 1874, " " " 1876, 273 " @ "	546 00		
April 1, 1876, " Apr. 30, 1877, 157 " @ 1.00	157 00		
		1,243	00

Bostona.

Mch. 20, 1874, to Mch. 31, 1876, 273 trips, @ 2.00	546 00		
April 1, 1876, " April 30, 1877, 145 " " 1.00	145 00		
		691	00

Telegraph.

Jany. 1, 1870, to April 30, 1877, 610 trips, @ 2.00		1,210	00

St. James.

April 1, 1873, to May 1, 1876, 231 trips, @ 2.00		462	00

Ohio No. 4.

Jany. 1, 1872, to April 30, 1877, 420 trips, @ 2.00		840	00

Potomac.

July 4, 1876, to April 30, 1877, 80 trips, @ 2.00		160	00

Exchange.

Jany. 1, 1873, to Oct. 15, 1876, 81 trips, @ 2.00		162	00

Granite State.

June 1, 1873, to Oct. 15, 1876, 60 trips, @ 2.00		120	00

Emma Graham.

June 1, 1873, to Nov. 30, 1873, 11 trips, @ 2.00		22	00

R. W. Dugan.

June 1, 1873, to Nov. 30, 1873, 11 trips, @ 2.00		22	00

10 *Skillinger.*

June 1, 1874, to Nov. 30, 1874, 20 trips, @ 2.00		40	00

Laura L. Davis.

June 1, 1875, to Nov. 30, 1875, 14 trips, @ 2.00		28	00
		$5,092	00

Upon which the following process issued, to wit:

Spa. in Chancery.

The United States of America to the marshal of the Kentucky District, greeting:

You are hereby commanded to summon the "Board of Trustees of the Town of Catlettsburg," Ky., to appear before our Circuit Court of the United States of America of the District of Kentucky, at the Federal Court hall, in the city of Covington, on the 1st Monday in July next, to answer a bill of equity exhibited against them in our said court by the "Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company," and this they shall in nowise omit, under the penalty of four hundred dollars, and have then there this writ.

In testimony whereof, Morrison R. Waite, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court, in Covington, this 11th day of JULY, A. D.
11 1877, and in the 101 year of our Independence.

[SEAL.] Attest: H. BOSTWICK,
C. C. C., K. D.

Memorandum.

The said defendants are required to enter their appearance in the clerk's office of said court on or before the first Monday in July, 1877, otherwise the said bill will be taken pro confesso.

H. BOSTWICK, *Clerk.*

Upon which spa. in chancery the marshal made the following return:

Mar. Return on Spa. in Chy.

Executed May 14th, 1877, by delivering a true copy of the within to Joseph Patton, David Rennor, John Dillon, Millard F. Hampton, and Robert Eastman, trustees, said trustees constituting the Board of Trustees of the town of Catlettsburg.

WEEDEN O'NEAL,
U. S. M., K. D.
By C. L. RUGG, *Deputy.*

Afterwards, to wit, on the 12th day of May, A. D. 1877, came the complainant, by its attorneys, Berry & Hounshell, and filed in the clerk's office its notice for motion for injunction, which notice is in the words and figures following:

Notice of Mo. for Injunction.

In the Circuit Court of the United States for the sixth cir-
12 cuit and district of Kentucky, in chancery sitting:

The complainants, the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, heretofore having instituted suit against the Board of Trustees of the town of Catlettsburg, in the Circuit Court of the United States at Covington, Kentucky, the said defendants, the Board of Trustees of the town of Catlettsburg, are hereby notified that the said complainants will, on *Thursday, May 17th*, 1877, at the court-house in Covington, Kentucky, move the Honorable Bland Ballard, judge of the District Court of the United States for the said district of Kentucky, for an injunction against said defendants restraining them from the further collection of tonnage duties as wharfage tax and rates at the port of Catlettsburg, Kentucky, from the complainants' boats engaged in commerce on the waters of the Ohio River; and also from the institution of any suits against the said complainants and masters and officers in command of their said boats, for the collection of any wharfage tax or rates whatsoever, under the ordinances of the town of Catlettsburg, or for any penalties authorized by the said ordinances.

13 Given under our hand this 12th day of May, 1877.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY,
By their attorneys, BERRY & HOUNSHELL.

Upon which notice the marshal made the following return, to wit:

Mar. Ret. on Notice.

Executed May 14, '77, by delivering a true copy of the within to Joseph Patton, David Kenner, John Dillon, Millard F. Hampton, and Rob't Eastman, trustees, said trustees constituting the Board of Trustees of the town of Catlettsburg.

WEDEN O'NEAL, *U. S. M., K. D.*
By U. L. RUGG, *Deputy.*

Afterwards, to wit, on the 16th day of May, A. D. 1877, the following order was made:

Order.

"This day came the complainant, by its solicitors, Messrs. Berry & Hounshell. Came also the defendant, by L. T. Moore, Esq., its attorney. The parties, by said attorneys, filed their written agreement, which is as follows, to wit:

"It is agreed between the complainant, the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company and the Board of

Trustees of the town of Catlettsburg, that the Board of Trustees of the town of Catlettsburg will not collect wharfage rates until after the cause is submitted to the court for an injunction, which may be done at any day after the twentieth of June, 1877, and in the meanwhile the appearance of defendants is to be made. But this agreement shall in nowise prejudice the rights of the parties as to the ultimate rights or the question involved in *in* this suit.

14

D. S. HOUNSHELL,
Att'y for Plaintiff.
L. T. MOORE,
Att'y for Defendant.

Afterwards, to wit, on the 21st day of June, A. D. 1879, the following agreement was filed, to wit:

Agreement.

It is agreed between the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company and the Board of Trustees of the town of Catlettsburg, that the status of the suit now pending between these parties shall remain and continue as by the agreement now on file, until the plaintiffs and defendants shall have written and exchanged printed briefs in said suit, which shall be done as soon as can be after the appearance of the defendants; and that the defendants may appear by demurrer and answer at the same time, if they choose so to do, without the answer operating to the prejudice of any of the defendants' rights raised by demurrer. And further, that the defendants shall appear and plead within eight days next after the date hereof; and that after the exchange of briefs as aforesaid, either party may, by letter, a reasonable time before the hearing of the case, notify the other of the time and place & of their intention to argue the case before the court or judge orally; and that no further notice, except by letter notifying the defendants of the time and place for hearing the motion for an injunction, shall be required, and said letter addressed to defendants' counsel, at Catlettsburg, Kentucky, shall be sufficient, provided it be in reasonable time.

15

Given under our hands this 21st day of June, 1877.

D. S. HOUNSHELL,
Of Counsel for Plaintiffs.
L. T. MOORE,
Of Counsel for Defendants.

Afterwards, to wit, on the 26th day of June, 1877, the defendants, by their counsel, filed their demurrer to complainants' bill, which is in the words and figures following, to wit:

Demurrer.

16 U. S. Circuit Court, Sixth Circuit and District of Kentucky.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET CO., Compl't,
vs.
BOARD OF TRUSTEES OF TOWN OF CATLETTSBURG, KY., Defend't.
} Dem'rs. Special & general.

Now comes the defend't, by counsel, & demurs to the bill of complainant herein, both specially and generally, & for special demurrer shows:

1. That this court has no jurisdiction of the parties or the subject-matter of the action.

2. That there is a defect of parties, plaintiff and defendant.

And for general dem'r shows:

1. That equity has no jurisdiction to hear or decide the matters & things complained of against def't in said bill.

2. That the facts stated in the said bill of complaint are not sufficient to constitute a cause of action against def't, or to enable compl't to have or maintain the same. Wherefore def't prays judg't, &c.

L. T. MOORE,
W. H. WADSWORTH,
Counsel for the Board Trustees of Catlettsburg aforesaid.

Afterwards, to wit, on the 6th day of December, 1877, the following order was made:

17 *Order & Agreement.*

By agreement of counsel this cause is submitted on the demurrers & brief for plaintiffs already in, with leave to file a printed brief for defendants, & rejoinder by plaintiffs, at any time before 10th Jan'y, prox'o, when the papers shall be submitted to the judge for his decision, unless the printed briefs are sooner filed. The clerk will transmit the papers earlier, if the briefs shall be filed earlier than the said 10th January.

D. S. HOUNSHELL,
Att'y for Plff.
L. T. MOORE,
Att'y for Defts.

Afterwards, to wit, on the 8th day of December, 1877, the following order was made, to wit:

Order.

This day comes the parties, by their attorneys, and filed their writ-

ten agreement herein, which said agreement is in the words and figures following, to wit:

Agreement.

Circuit Court of the United States for the 6th Circuit and District of Kentucky.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY
vs.
BOARD OF TRUSTEES OF THE TOWN OF CATLETTSBURG.

It is agreed herein that the order entered herein on yesterday be so modified as to change the date therein, to wit, the 10th
18 day of January, 1878, to the 1st day of February, 1878.

D. S. HOUNSHELL,
For Complainant.
L. T. MOORE,
For Defts.

Afterwards, to wit, on the 7th day of February, 1878, the following order was made, to wit:

Order.

This day came the complainant, by D. S. Hounshell, Esq., one of its solicitors, and on its motion it is ordered that the order entered herein on December 6th, 1877, be so modified as to change the date to March 1st, 1878, at which time papers are to be forwarded by clerk to the judge for his decision.

Afterwards, to wit, on the 14th day of May, 1878, the following order was made, to wit:

Judgt.

The court delivered the following opinion: The bill of complainants is not very explicit, but, as I understand it, the bill seeks to have the defendants enjoined from collecting certain charges for the use of their wharf on the sole ground that the charges have been made and determined by the tonnage of complainants' vessels. Assuming this to be the essence of the complaint, I am of opinion that complainants are not entitled to an injunction. It is now settled that charges made by a city or town for the *use* of its improved
19 wharf by boats proportionate to their tonnage, is not unconstitutional or otherwise illegal. It is not a tonnage tax. A question might be made as to the validity of so much of the ordinance of May 5th, 1873, as require all steamboats arriving at the town of Catlettsburg to land at a particular wharf; but the bill does

not complain of this ordinance. It may be that should a city, under the guise of charging a boat for the *use* of its wharf, charge it a palpable excessive sum, whether said charges referred to the tonnage of the boat or not, might be regarded as illegal—being a duty of tonnage in the one case and a regulation of commerce in the other; but I do not understand the bill to complain of excessive charges with sufficient distinctness to entitle complainants to any relief. It does state that the "taxes so imposed by the said defendants were excessive and much beyond all reasonable charges for the use of said wharf; that in fact the amount already collected for the use of said wharf, as aforesaid, greatly exceeds the cost of erection and continuance of the same; but complainants do not ask relief against *excessive charges*. They ask relief against *all* charges. Allegations in respect to the excessive charges is not sufficiently
20 explicit to entitle complainants to any relief. And the allegation that the amount already collected for the *use* of said wharf greatly exceeds the cost of the erection and continuance of the same, is certainly too indefinite.

The demurrer is sustained, but complainants may, if they can, amend their bill on or before the 18th inst.

Afterwards, to wit, on the 21st day of May, 1878, the following entry was made, to wit:

Order.

This day came the complainants, by their counsel, Berry & Hounshell, and on their motion leave is given them to file an amended bill herein on or before the 4th day of June, 1878.

Afterwards, to wit, on the 4th day of June, 1878, came the complainants, by their counsel, Berry & Hounshell, and filed in the clerk's office their amended bill herein, which is in the words and figures following:

Amended Bill.

To the honorable the judges of the Circuit Court of the United States for the sixth circuit and district of Kentucky, in chancery sitting:

Your orators, the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co., come and by leave of court amend their original bill herein by striking out of said bill the words "public wharf" in the fourth paragraph thereof, and amending the same by substi-
21 tuting in lieu thereof the word port, making the original bill as amended to read as follows: That, in the course of said navigation the said steamboats of your orators made frequent landings at the port of said town of Catlettsburg.

Your orators further amend their original bill by adding thereto

the following paragraph immediately after the word "thereof," which is the last word of the fifth paragraph of their original bill:

Your orators further state that within the port of said town of Catlettsburg there is a natural and unimproved shore of the Ohio convenient and in every way suitable for landing your orators' boats, and that after the 1st day of January, 1870, and before the 30th day of April, 1877, your orators made at the natural and unimproved shore of the Ohio River five thousand and ninety-two landings (5092) with their said boats at the port of Catlettsburg, at points other than at the improved landing of the defendants, between Main and Division streets, and for each of said landings were subjected by said defendants to an illegal tax, proportion to the tonnage of each of said boats, at the rate of one dollar for each landing, which said taxes were wrongfully and without right exacted and collected from your
22 orators against their will by the said defendants; and that the said defendants under their several ordinances bearing date February 23d, 1871, and May 5th, 1873, the same set forth in your orators' original bill, have claimed and still claim the right to exclude your orators from the port of Catlettsburg unless they pay said illegal taxes aforesaid; and your orators are advised and charge the fact to be that said ordinance of the 5th of May, 1873, is violative of your orators' rights, and are oppressive grievance to them.

Your orators further amend their original bill by striking out of the sixth paragraph thereof, after the words contrary to "section ten of," making the same as amended to read: That your orators are advised by counsel and so allege that the said tonnage tax or duty is a regulation of commerce and a duty of tonnage, and as such is unconstitutional and void, and contrary to the first article of the Constitution of the United States.

Your orators further amend their original bill by adding in the eight thereof, after the word were and before the word excessive, the words and are, and substituting in the same paragraph, after
23 the words much beyond, the word any for the word all of the original bill, which is stricken out of said bill, and further striking out of said paragraph of said bill all that part of the same beginning at the words "and the wharf-master of the defendants," and ending with the words "past the 15th day of March, 1871," thereby making the eighth paragraph of the original bill as amended to read as follows: Your orators further state that the said taxes so imposed by the said defendants were and are excessive and much beyond any reasonable charges for the use of said wharf by your orators' boats, and tend in a great degree to obstruct the navigation of said river; that, in fact, the amount already collected for the use of said wharf as aforesaid greatly exceeds the cost of erection and the continuance of the same, and that said taxes so collected by the defendants have been and are now continued to be appropriated as a general revenue fund to other purposes of said city, in no way connected with said wharf improvements. Wherefore your orators pray that the said defendants be enjoined and restrained from the

collection of all taxes whatsoever from your orators' boats while landing at the natural and unimproved shore of the Ohio River within the corporate limits of the town of Catlettsburg, and also while landing at the port of Catlettsburg at points other than the improved landing of the defendants, between Division and Main streets, and that the defendants be restrained and enjoined also from the collection of all excessive taxes from your orators' boats while landing at any point within the corporate limits of the town of Catlettsburg, at the port of Catlettsburg, and that they be restrained and enjoined from the enforcement of said ordinance of the 5th of May, 1873, requiring your orators' boats to land at the improved wharf of the defendants, between Division and Main streets, and nowhere else, without the written consent of their wharf-master; and that they be restrained and enjoined from the institution of any suits against your orators for the collection of any penalties for any violation of your orators of said ordinance of the 5th of May, 1873, by refusing to land at the improved wharf of the defendants, between Main and Division streets, and that, upon a final hearing, the said defendants be perpetually enjoined from every effort to exclude your orators' boats from landing at the natural and unimproved shore of the Ohio River, unless said illegal taxes are paid by your orators to the defendants; and your orators, in respect to the prayer of their original bill, pray all the benefits resulting therefrom, the same as if said prayer were translated and repeated herein. As in duty bound, they will ever pray.

BERRY & HOUNSHELL,
Of Counsel for Complainants.

Afterwards, to wit, on the 6th day of December, 1878, the following order was made, to wit:

Order.

This day came the complainants by their counsel, D. S. Hounshell, Esq.; came also the defendants by their counsel, W. H. Wadsworth and L. T. Moore, Esq.; and the defendants by their counsel filed demurrer to the amended bill herein, to which complainants filed joinder, and the matters of law arising on said demurrer having been fully argued, the court not being sufficiently advised takes time.

The following is the demurrer referred to in the foregoing order, to wit:

Demurrer.

United States Circuit Court for the District of Kentucky.

CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET COMPANY, Complainants,
vs.
TRUSTEES OF CATLETTSBURG, Defendants.
} Demr.

Now comes the def't, The Board of Trustees of the Town of Catlettsburg, by counsel, & demurs to so much & such parts of the amended bill of complaint as hereinafter specified, viz:

26 1*st.* To all that part of said amended bill which seeks to enjoin the defendant from collecting wharfage from complainant under defend'ts' ordinance, bearing date Feb'ry 23rd, 1871, fully & at large set out in said amendment.

2*d.* To all that part of said amendment which seeks to enjoin defend't from enforcing the due and proper execution of its ordinance, bearing date May 5th, 1873, recited & set out in said amendment.

3. To all that part of said amendment which seeks to recover back from def't the sum of $5,092, wharfages paid by complainant to defend't, as shown by said amendment. Because, as defend't says, said amended bill does not state facts sufficient to enable complainant to have or demand the relief sought & prayed for in that behalf.

4*th.* And defend't demurs to the whole of said amended bill because same does not state facts sufficient to enable complainant to maintain same against def't, or to entitle *him* to the relief demanded.

L. T. MOORE,
W. H. WADSWORTH,
For Defendt.

Afterwards, to wit, on the 14th day of April, 1879, the following order was made, to wit:

27 *Order.*

The court now being fully advised of the law arising on the defendants' demurrer to complainants' amended bill, it is considered by the court that the law on the demurrer is for the defendants. It is therefore considered by the court that the amended bill be dismissed, and that the defendants go hence and recover of complainants their costs in this behalf expended; and the complainant, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, pray an appeal to the Supreme Court of the United States, which is granted.

UNITED STATES OF AMERICA,
District of Kentucky.

I, Henry Bostwick, clerk of the Circuit Court of the United States

for the District of Kentucky, (at Covington,) do hereby certify that the foregoing 27 pages, this included, contain a true and complete transcript of the record of the proceedings had in the court in the suit wherein The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company were complainants, and The Board of Trustees of the town of Catlettsburg were defendants, down to and including the last entry of the action of the court in the cause, as the same remains on record in my office.

28

In testimony whereof, I have hereunto signed my name and affixed the seal of this court, this 28 day of April, A. D. 1879.

[SEAL.]

Attest:

H. BOSTWICK,
C. C. C., K. D.

29

Supreme Court of the United States.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET CO.
vs.
THE BOARD OF TRUSTEES OF THE TOWN OF CATLETTSBURG.
} In Error.

Know all men by these presents, that we, The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co., and R. S. Semple, are held and firmly bound unto the above-named Board of Trustees of the town of Catlettsburg in the sum of five hundred dollars, to be paid to the said Board of Trustees of the town of Catlettsburg, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals, and dated at Covington, Ky., this 24th day April, A. D. 1879.

Whereas the above-named Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court:

Now, therefore, the condition of this obligation is such, that if the above-named Cin., Ports., Big Sandy & Pom. Packet Co. shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C., P., & BIG S. POM. PAC. CO.,
By DAVID GIBSON, *Pres.* [L. S.]
R. S. SEMPLE. [L. S.]

Sealed and delivered in presence of—
H. BOSTWICK.
J. M. BLACKMAN.

Approved: BLAND BALLARD.

30 UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Henry Bostwick, clerk of the United States Circuit Court for the District of Kentucky, (at Covington,) do certify that the within is a true and correct copy of the bond now on file in my office, and that R. S. Semple, who has signed the same as surety, is personally known to me to be perfectly good and responsible for the within named amount.

In witness whereof, I have hereunto set my hand and seal of said court, this 29th day of April, A. D. 1879.

[SEAL.]

H. BOSTWICK,
C. C. C., K. D.